

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, *et al.*,
Petitioners,

v.

GENTNER DRUMMOND, Attorney General for the State
of Oklahoma, *ex rel.* STATE OF OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General for the State
of Oklahoma, *ex rel.* STATE OF OKLAHOMA,
Respondent.

ON WRITS OF CERTIORARI
TO THE OKLAHOMA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Oklahoma constitution requires the State to “establish[] and maint[ain] ... a system of public schools, which shall be open to all the children of the state and free from sectarian control” Okla. Const. art. I, § 5. Oklahoma law follows this dictate, including with respect to its charter schools, which are part of Oklahoma’s “public school[]” system. Okla. Stat. tit. 70, § 3-132.2(C)(1)(b). Thus, in Oklahoma—as is required under the federal charter school program and the laws of all 46 States with charter-school laws— “[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations.” *Id.* § 3-136(A)(2); *see* 20 U.S.C. § 7221i(2)(E). The Oklahoma Supreme Court held that petitioners could not establish a public charter school that “fully incorporate[s] Catholic teachings into every aspect of the school, including its curriculum and co-curricular activities.” Pet.App.26a (No. 24-394). The question presented is:

Whether the First Amendment requires the State of Oklahoma to establish, fund, and oversee religious public charter schools because it establishes, funds, and oversees nonreligious public charter schools.

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INTRODUCTION

We start with common ground: The exclusion of religious institutions from generally available benefits programs based solely on religion is odious to the Constitution. Oklahoma condemns such discrimination, and it promotes school choice and access to private religious education for Oklahomans who choose such education for their children through generally available benefits such as tax credits and tuition assistance. Likewise, as these programs underscore, Oklahoma readily agrees that there is no categorical bar against public monies reaching (and funding) private religious schools, including for devotional instruction and ministry, through such parental choice programs. Oklahoma also condemns the Blaine Amendments and the invidious anti-Catholic bias that motivated them. And, while we're at it, Oklahoma sheds no tears over the long-overdue demise of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court can thus move quickly beyond the principal strawmen on which petitioners' arguments rest.

Oklahoma's charter-school system is not a modern-day vestige of the Blaine Amendments, and it was not crafted in homage to *Lemon*. Instead, it tracks the *federal* charter school program (CSP)'s definition of a "charter school" and accords with the laws of 45 other States—all of which require that charter schools both be public and nonsectarian. If Oklahoma's charter-school law violates the Free Exercise Clause because of odious discrimination against religion, then so does the federal CSP—which has funneled billions of dollars of critical aid to charter schools across the country—and so do the laws of 45 other States. In other words, if

Oklahoma’s charter-school law violates the Free Exercise Clause, then this is one of the most far-reaching free exercise violations in the Nation’s history. Yet it somehow escaped the attention of the Congress that passed the federal charter-school law; the George W. Bush Administration—hardly known for its hostility to religion—which implemented the law’s restrictions; and the dozens of red and blue States that passed similar charter-school laws.

There is no Free Exercise Clause violation. The nondiscrimination mandate recognized by this Court’s cases—including the recent *Trinity Lutheran-Espinoza-Carson* Trilogy—is undeniably vital. But it is not the only principle that guides how States must structure their educational systems. Indeed, in *Carson ex rel. O.C. v. Makin* itself, this Court observed that States “may provide a strictly secular education in their public schools.” 596 U.S. 767, 785 (2022). Remarkably, neither petitioners nor the United States acknowledge that rule. But it is hardly surprising. In a series of landmark cases petitioners do not question, this Court has held that the First Amendment bars religious prayer and instruction in public schools. Certainly that would include the education that St. Isidore seeks to offer students, as “a place of real and specific pastoral ministry,” led by “educators, administrators, and coaches as ministers committed to living and teaching Christ’s truths, as understood by the Magisterium of the Roman Catholic Church.” Pet.App.218a, 221a (No. 24-396).¹ No one doubts that such an education can be profoundly valuable. But it is not one that States must provide in public schools.

¹ Unless otherwise noted (as here), references to cert-stage appendices are to the filings in No. 24-394.

So the obvious question is whether Oklahoma’s charter schools are public schools. And on that question, Oklahoma law, federal law, and ordinary meaning all lead to the same conclusion: They are. Charter schools no doubt offer important educational innovations, but they bear *all* the classic indicia of public schools. They are free, open to all, subject to antidiscrimination laws, created and funded by the State, and subject to continuing government regulation and oversight as to curriculum, testing, and a host of other matters. It is thus no surprise that federal law and the laws of 46 States, including Oklahoma, define charter schools as public schools. Of course, labels are not enough—a principle that applies equally to the “private contractor” label petitioners repeatedly invoke. But neither the decision below nor Oklahoma law rests on labels. Overwhelming *substantive* indicia show that charter schools are public schools.

As public schools, charter schools naturally satisfy the Court’s “government entity” precedents—which, as the United States rightly notes (at 3, 19), are a far better fit for this case than the state-action doctrine on which petitioners build their case. Oklahoma charter schools are “established” by the State; they depend on the State, and are considered “local educational agencies,” for funding; they report to and are pervasively supervised by the State; and they can be unilaterally closed by the State. That unique combination of factors—which is *not* present for the faith-based contractors and public-benefit recipients that petitioners and their *amici* claim are threatened by the decision below—satisfies any applicable government-entity analysis. And even if the Fourteenth Amendment’s state-action caselaw applied here, Oklahoma’s charter schools would qualify as relevant to

the question presented here. Either way, because charter schools are part of Oklahoma’s public-school system, the State may require that they be “strictly secular.” *Carson*, 596 U.S. at 785.

Petitioners nevertheless ask this Court to hold that Oklahoma must—as Oklahoma law literally puts it, *see* Okla. Stat. tit. 70, §§ 3-132.2(C)(1)(b), 3-134(C)—“establish[]” St. Isidore, a self-described “place[] of evangelization” for the Catholic church, as a charter school, Pet.App.201a (No. 24-396). That holding not only would produce the Nation’s first public religious school, but have sweeping consequences. A ruling that Oklahoma’s charter-school law unconstitutionally discriminates against religion would upend the federal CSP and charter-school laws nationwide, sowing chaos and confusion for millions of charter-school students. At the same time, requiring States to establish religious charter schools either would subject religious institutions to regulations from which they are typically immune, or grant religious charter schools a special status—given that, as St. Isidore says, it can only comply with generally applicable laws “that are consistent with the School’s constitutional rights as a religious school under the auspices of the Catholic church.” *Id.* at 223a. And a ruling for petitioners would eliminate the buffer this Court has long enforced between religious instruction and public schools—including in areas where charter schools are the only or default public-school option.

The Oklahoma Supreme Court’s decision should be affirmed.

STATEMENT OF THE CASE

A. Oklahoma's Educational System

Public schools. Since 1907, Oklahoma's constitution has "require[d] the Legislature to establish and maintain a system of public schools." *Wilson v. Gipson*, 753 P.2d 1349, 1355 (Okla. 1988) (citing Okla. Const. art. XIII, § 1). Oklahoma has thus "adopt[ed] and provid[ed] a complete, uniform, and comprehensive system of schools for the benefit of the entire state and its citizenship." *Consolidated Sch. Dist. No. 1 of Tulsa Cnty. v. Wright*, 261 P. 953, 955 (Okla. 1927). And the Oklahoma Supreme Court has long recognized that creating and operating this public-school system are "governmental functions in their entirety." *Id.*; see *Wilson*, 753 P.2d at 1355.

Two core features of Oklahoma's public-school system are: (1) it comprises "free schools supported by public taxation[]," Okla. Stat. tit. 70, § 1-106; and (2) its schools are open to "all the children of the State," Okla. Const. art I, § 5. Oklahoma effectuates the requirement that its public schools be "free" by funding them through the "State Aid Formula," which is based on average daily attendance and other factors. See Okla. Stat. tit. 70, § 18-200.1(A). And to ensure that its public schools remain truly "open to all," Oklahoma requires its public schools to be "free from sectarian control." Okla. Const. art I, § 5.

By creating and funding public schools, Oklahoma ensures that a K-12 education is available for all of its citizens. Doing so is especially important because, like all States, Oklahoma imposes compulsory education requirements. Okla. Stat. tit. 70, § 10-105(A).

Private schools. Oklahoma also recognizes the value of private schooling—including religious education—and strongly supports that option, too.

For example, Oklahoma’s Parental Choice Tax Credit Act provides vouchers up to \$7,500 annually for parents to send their children to a private school of their choice—religious or not. *See* Okla. Stat. tit. 70, § 28-101(B), (C)(1), (G)(3). Oklahoma also provides need-based scholarships for students to attend private schools, including religious schools—averaging \$2,695 per student annually. *See* Okla. Stat. tit. 68, § 2357.206; *Oklahoma Equal Opportunity Education Scholarships*, edChoice, <https://tinyurl.com/bdebh5bf>. And Oklahoma provides additional vouchers—averaging over \$8,000 per student annually—for other students, such as those with disabilities, to attend private schools, including religious schools. *See* Okla. Stat. tit. 70, § 13-101.2(A); *Lindsey Nicole Henry Scholarships for Students with Disabilities*, edChoice, <https://tinyurl.com/3t7vvdet>.

These programs—along with homeschooling—promote the ability of parents who want a religious education for their children to secure one.

B. Public Charter Schools

Like most States, Oklahoma offers an additional option within its public-school system—the charter school—which was born of an effort to innovate and improve public-school options for families.

Federal law. In 1994, Congress bolstered the fledgling charter-school movement by enacting the federal CSP, which has funneled billions of dollars in federal funds to charter schools across the country. *See* Pub. L. No. 103-382, tit. X, pt. C, §§ 10301-07, 108 Stat. 3518, 3824-30. CSP grants are restricted to

“charter schools” as defined by federal law. 20 U.S.C. §§ 7221b(b)(1), 7221c(e), 7221d(b)(1). And federal law, in turn, defines a “charter school” to mean “a public school that,” among other things, “does not charge tuition” and “is nonsectarian in its programs, admissions policies, employment practices, and all other operations.” *Id.* § 7221i(2)(E)-(F).²

Today, 46 States—plus DC, Guam, and Puerto Rico—have charter-school laws, all of which “make clear that charter schools are privately operated public schools—rather than publicly funded private schools.” Margaret F. Brinig & Nicole Stelle Garnett, *Lost Classroom, Lost Community: Catholic Schools’ Importance in Urban America* 149 (2014). Charter schools can provide life-changing opportunities for students—particularly for low-income and minority students who, in some areas, have been ill-served by traditional public schools. *See, e.g.*, Margaret E. Raymond et al., *As a Matter of Fact: The National Charter School Study 2023* at 52, 96, Credo (June 19, 2023), <https://tinyurl.com/mrv3xa2v>.

The charter-school movement is one of the great success stories in American education. Indeed, in some places, charter schools are not only the best option—they are the *only* option. For the last seven years, New Orleans completely replaced its traditional public schools with charter schools; only last year did it re-open a single, district-operated K-8

² Federal guidance promulgated by the George W. Bush Administration in 2004 confirmed these points. *See Charter Schools Program, Title V, Part B Non-Regulatory Guidance* 15, U.S. Dep’t Educ. (July 2004) (“CSP Guidance”), <https://tinyurl.com/yh7fnpds> (“May a charter school be religious in nature? No. As public schools, charter schools must be non-religious in ... all [their] operations”).

school. See Beth Hawkins, *After a 7-Year Experiment, New Orleans Is an All-Charter District No More*, Route Fifty (June 3, 2024), <https://tinyurl.com/24sm897t>; see *infra* 12-13 (describing Oklahoma charter schools that are assigned as the default public-school option for students).

Oklahoma law. Oklahoma has offered public charter schools within its system of public education since 1999. Okla. Stat. tit. 70, § 3-130, *et seq.*

1. Tracking federal law (and every other relevant state law), Oklahoma law defines a “charter school” as a “public school.” *Id.* § 3-132.2(C)(1) (citing and incorporating the federal definition of “charter school”); see Brinig & Garnett, *supra*, at 149. This is not a mere label; Oklahoma law knits charter schools into the very fabric of its public-school system.

Oklahoma’s charter schools must be “equally free and open to all students as traditional schools and shall not charge tuition.” Okla. Stat. tit. 70, § 3-136(A)(9). They are also “considered a local education agency for purposes of funding.” *Id.* § 3-142(D). Thus, like other public schools, they receive the “State Aid allocation,” plus federal funds to which they are entitled. *Id.* § 3-142(A). And like other public schools, *id.* § 11-101, they must be “nonsectarian in [their] programs, admissions policies, employment practices, and all other operations,” *id.* § 3-136(A)(2).

Charter schools are distinct legal entities created by the State. They can be established only by contracts between a chartering organization and a “sponsor”—which, for a virtual charter school like St. Isidore, can only be the Oklahoma Statewide Charter School Board (Board). *Id.* § 3-132.1(A). Before a contract is validly executed, no “charter school” exists.

See id. § 3-132.2(C)(1)(b) (defining a “charter school” as “a public school established by contract with ... the Statewide Charter School Board”); *id.* § 3-134(C) (similar, and noting that “private school[s] shall not be eligible to contract for a charter school or virtual charter school”); Okla. Admin. Code § 210:40-87-5(b) (describing point at which the “[e]stablishment of a new charter school” occurs).

Oklahoma law reinforces that charter schools are distinct from their chartering entities in several ways. For example, charter schools “may enter into contracts and sue and be sued” (as a distinct legal entity), Okla. Stat. tit. 70, § 3-136(E); a single applicant may create multiple charter schools, each of which must remain “separate and distinct from any other charter school,” *id.* § 3-136(B); and any property bought with state funds reverts to the State, not the chartering entity, when the school closes, *id.* § 3-136(G).

The State not only establishes charter schools; it remains deeply involved in their operations. The Board “[p]rovide[s] supervision, services, and oversight,” *id.* § 3-132.2(A)(1), and thus typically is in frequent contact with charter schools. Charter schools are subject to the same testing and reporting requirements as other public schools, and must comply with the same “health, safety, civil rights, ... insurance,” and disability laws. *Id.* § 3-136(A)(1), (4), (6). They must provide the same number of days and hours of instruction, *id.* § 3-136(A)(10), and are subject to an intensive “performance framework” through which the State assesses them, *id.* § 3-136(A)(18).

Charter schools have flexibility in designing their curricula, as traditional public schools increasingly do. For both, the State “adopt[s] subject matter standards.” *Id.* § 11-103.6(A)(1); *see id.* § 3-134(B)(12)

(requiring charter schools’ “academic program [to] align[] with state standards”). Then, either the local school district or charter school’s governing board devises a curriculum to “ensure that students meet ... th[ose] ... standards.” *Id.* § 11-103.6(A)(2); *see id.* § 11-103.6a(F) (curricular design “exclusively” the duty of local school districts); *id.* § 3-134(B)(13) (similar for charter schools).³ For charter schools, the government sponsor must approve their curricula before such curricula can be either taught or changed. *Id.* §§ 3-134(B)(13), 3-136(A)(3), (D).

The State also imposes certain requirements on what must, and may not, be taught in charter schools. For example, charter schools “shall offer a minimum of one computer science course to students,” *id.* § 11-103.6m(C)(1), and must “provide ... cursive handwriting” instruction for certain grades, *id.* § 11-103.16; *see id.* § 1210.508-5 (requiring opportunity for certain students to take armed-services aptitude test). On the flip side, Oklahoma law prohibits charter schools and traditional public schools alike from teaching certain materials or methods—such as those relating to critical race and gender theories. *See id.* § 24-157(B)(1); *id.* § 1210.508B(D) (prohibiting use of certain method of teaching reading); *see also id.* § 11-202 (regulating content of charter-school libraries). These restrictions do not apply to private schools—which need not even be accredited to operate.

³ Some traditional public schools have thus adopted innovative curricula, too. *See, e.g., Immersion Program*, Tulsa Pub. Schs.: Eisenhower Int’l Sch., <https://tinyurl.com/4tarvt64> (public “language immersion school”); *Academic Programs*, Wilson Elementary Arts Integration Sch., <https://tinyurl.com/mrx64cxw> (public school with fine-arts curriculum).

Oklahoma’s charter schools are also subject to many of the same rules as other public schools as to how they treat their students, including: electronic communications with students, *id.* § 6-401; suspension, *id.* § 3-136(A)(11); busing, *id.* § 3-141(A); financial aid, *id.* § 1210.508-6; and certain health and well-being information, *see, e.g., id.* §§ 1210.196(B), 24-100.10(A). Like other public schools, charter schools also must respect parents’ rights to “object to Sex or Sexuality education or any other instruction questioning beliefs or practices in Sex, morality, or religion.” Okla. Admin. Code § 210:10-2-3(a)(3); *see id.* §§ 210:10-2-1 to 210:10-2-2.

Oklahoma’s charter schools are also subject to many of the same organizational rules as other public schools. For example, they are considered a “school district” under the Oklahoma Governmental Tort Claims Act. Okla. Stat. tit. 70, § 3-136(A)(12). Their boards are subject to the same conflict-of-interest, continuing-education, audit, reporting, and Open Meeting and Open Records Act rules as traditional public-school boards. *See id.* § 3-136(A)(5), (7), (15). As a result, their boards are considered “[g]overnmental’ ... board[s]” for purposes of Oklahoma’s judicial ethics rules. Okla. Judicial Ethics Op. 2023-3, 538 P.3d 572, 572 (Okla. Jud. Eth. Adv. Pan. Oct. 16, 2023). And charter-school teachers may participate in the same public-employee retirement and insurance programs as other public-school teachers. Okla. Stat. tit. 70, § 3-136(A)(13)-(14).

Finally, the State can unilaterally shut down charter schools. In cases of poor performance, charter non-compliance, and other good cause, a sponsor may revoke a school’s charter and close the school. *Id.* § 3-137(F); *see id.* § 3-137(H) (providing for closure

when charter school is “ranked in the bottom five percent (5%) of all *public schools*” (emphasis added)). And for property bought with State funds, that property is “retained by the sponsor”—not the chartering entity—upon closure. *Id.* § 3-136(G); Resp.App.32a.

To be sure, Oklahoma’s charter schools—just like, say, magnet schools—are not identical to traditional public schools in *every* respect. For example, charter schools may adopt “different and innovative teaching methods,” and “emphasize[] a specific learning philosophy or style or certain subject areas.” Okla. Stat. tit. 70, §§ 3-131(A)(3), 3-136(A)(3). They are not run by school-district boards. *Id.* § 3-136(A)(7). And they are exempt from some legal restrictions. *Id.* § 3-136(A)(1). But these variations do not change the fact that charter schools are public schools that offer “additional academic choices” *within* the State’s public-school system—and are subject to the supervision of the State. *Id.* § 3-131(A)(4); *see id.* § 3-132.2(C)(1).

2. During the 2022-23 school year, Oklahoma had 30 charter schools serving over 50,000 (about 7.2%) of the State’s public-school students. *Oklahoma Charter School Report 2023* at 10, Okla. State Dep’t Educ. (2023), <https://tinyurl.com/46jvceps>.⁴ These schools received about \$314 million in state aid, and \$69 million in federal CSP funds. *Id.* at 7-8.

In some areas, students are presumptively assigned by the local school district to a charter school

⁴ This includes seven virtual charter schools. *Virtual Charter Schs.*, Okla. Statewide Charter Sch. Bd., <https://tinyurl.com/7hy5xthn>. Some traditional school districts in Oklahoma also offer virtual options. *See, e.g., About Us*, Lawton Virtual Acad., <https://tinyurl.com/23cvp6mm>; *Virtual Edmond*, Edmond Pub. Schs., <https://tinyurl.com/yeynx7w3>.

as their default public school. *See, e.g., Admissions, Western Gateway Elementary*, <https://tinyurl.com/45n5fcy3>; *Admissions FAQ, John Rex Charter Schs.*, <https://tinyurl.com/j66c84hj>. Such students may move to a traditional public school, but must affirmatively opt out of the charter school to do so. *See id.*

C. St. Isidore, Inc.’s Attempt To Design The Nation’s First Catholic Charter School

1. In January 2023, the Archdiocese of Oklahoma City and the Diocese of Tulsa formed a non-profit corporation called St. Isidore of Seville Virtual Charter School, Inc. (St. Isidore, Inc.).⁵ Pet.App.216a (No. 24-396). According to its bylaws, St. Isidore, Inc.’s purpose is “[t]o create, establish, and operate” St. Isidore “as a Catholic school.” *Id.* at 218a. The school would “derive[] its original characteristics” from “its Catholic identity,” serve “as a genuine instrument of the Church, a place of real and specific pastoral ministry,” and “participate[] in the evangelizing mission of the Church.” *Id.* It would thus “operate ... in harmony with faith and morals, including sexual morality, as taught and understood by the Magisterium of the Catholic church”; and it planned to “hire educators, administrators, and coaches as ministers committed to living and teaching Christ’s truth.” *Id.* at 221a.

St. Isidore, Inc.’s bylaws are also clear that it views its obligation to comply with the Oklahoma Charter Schools Act and its requirements as contingent on the law’s consistency with its religious mission. It will be subject only “to the requirements [of the Act] that are

⁵ Because St. Isidore, Inc. is a separate corporate entity from the public charter school it argues the State was required to establish, we refer to the preexisting entity as “St. Isidore, Inc.” and the proposed charter school as “St. Isidore.”

consistent with the School’s constitutional rights as a religious school.” *Id.* at 223a. And although St. Isidore, Inc. includes an antidiscrimination policy as required by law, it explicitly reserves the right to give “priority ... to the Catholic Church’s understanding of non-discrimination.” *Id.* at 249a.

2. In May 2023, St. Isidore, Inc. applied to the Board seeking to establish St. Isidore as a virtual charter school that “fully embraces the teachings of the Catholic Church’s Magisterium” and “fully incorporates these [teachings] into every aspect of the School.” Resp.App.42a, 458a.

That application confirmed that St. Isidore’s commitment to comply with the law would go only as far as permitted by the “priority given to ... the Catechism of the Catholic Church.” *E.g., id.* at 296a. It stated that “[a]ll students are welcome” to attend the school—but added that “[a]dmission assumes the student and family willingness to adhere with respect to the beliefs, expectations, policies, and procedures of the school as presented in the handbook.” *Id.* at 193a. St. Isidore’s *Parent & Student Handbook*, in turn, explains that students are, among other things: expected to adhere to “the belief[]” that “Christ is present in the Holy Eucharist”; “required” to attend at least one all-school Catholic mass; and required to “support the [religious] mission of the School.” *Parent & Student Handbook 2024-2025* at 27, 42-43, 45, St. Isidore Seville Catholic Virtual Sch. (Mar. 18, 2024), <https://tinyurl.com/33k8fhck> (*Handbook*).

3. In June 2023, the Board voted 3-2 to approve St. Isidore, Inc.’s application. Pet.App.166a-71a (No. 24-396). In October 2023, the Board and St. Isidore, Inc. executed a charter contract establishing St. Isidore as a charter school. Resp.App.1a-41a; *see* Okla.

Stat. tit. 70, § 3-132.2(C)(1)(b). Under that contract, the Board’s approval is required for “[a]ny material change to [St. Isidore’s] program of instruction” or “curriculum.” Resp.App.5a.

D. This Litigation

On October 20, 2023, the Attorney General sued the Board directly in the Oklahoma Supreme Court, asking the court to cancel St. Isidore’s charter contract and declare its establishment unlawful. JA1. St. Isidore, Inc. intervened. Pet.App.2a. On June 25, 2024, the Oklahoma Supreme Court ruled for the Attorney General, holding in a 6-2 decision that establishing St. Isidore as a Catholic public charter school was unlawful. *See id.* at 1a-30a.

First, the court explained why the St. Isidore contract violated Oklahoma and federal law. Funding a religious charter school violated limitations in the Oklahoma constitution on the public funding of religion as well as Oklahoma’s statutory requirement that charter schools must be “nonsectarian in their programs, admission policies, and other operations.” *Id.* at 14a-15a. Moreover, the St. Isidore contract violated the Establishment Clause because it would require public-school “students to spend time in religious instruction and activities, [and] permit state spending in direct support of the religious curriculum and activities within St. Isidore.” *Id.* at 26a.

Second, the court held that “St. Isidore is a governmental entity,” not merely a private contractor, given the many ways Oklahoma charter schools are integrated into the State and public-school system. *Id.* at 17a-19a. St. Isidore would “be acting as a surrogate of the State in providing free public education as any other state-sponsored charter school.” *Id.* at 19a.

The court likewise rejected petitioners’ “claim that St. Isidore is not a state actor.” *Id.* at 20a-24a.

Third, the court concluded that the Free Exercise Clause did not compel a different result. The court explained that the *Trinity Lutheran-Espinoza-Carson* Trilogy did not govern because St. Isidore, Inc. was seeking “the State’s creation and funding of a new religious institution,” with “religious teachings,” as a “component of the State’s public school system,” in violation of the Establishment Clause, and was not simply excluded from a general benefits program because it is a religious entity. *Id.* at 27a-30a.

SUMMARY OF ARGUMENT

I. This Court’s precedent establishes two clear rules for evaluating restrictions on funding religious education. First, “once a State decides” to “subsidize private education,” “it cannot disqualify some private schools solely because they are religious.” *Carson*, 596 U.S. at 779-80. And, second, States “may provide a strictly secular education in [their] public schools.” *Id.* at 785. These rules harmonize the protections of the Free Exercise Clause and the Establishment Clause, and accord with the history of government-funded private education.

II. The key question here is thus whether Oklahoma’s charter schools are public schools. They are. And it follows that charter schools are public entities for relevant constitutional purposes here, too.

Federal and state law, dictionaries, and common usage all show that the term “public schools” has a consistent and well-defined meaning: Public schools are free, open to all, funded by the State, subject to state control, nondiscriminatory, and nonsectarian. Oklahoma’s charter schools meet all of those criteria.

Indeed, while it largely avoids the issue, the United States admits (at 26) that “Oklahoma charter schools *are* ‘public’ in an important sense.” That concession alone refutes petitioners’ central claim that charter schools only bear a “public school” label; petitioners never address, much less overcome, the many ways in which Oklahoma law makes clear that, *in substance*, charter schools are the State’s public schools. The Court need go no further to conclude that Oklahoma may require that its charter schools be secular.

This Court’s government-entity caselaw—which the United States asks the Court to apply here—confirms that charter schools are public entities for constitutional purposes. As the United States explains, this Court has focused on “two structural considerations” in determining whether bodies qualify as government entities: “government ‘creat[ion]’ and government ‘control.’” US.Br.20 (quoting *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 383, 396-97 (1995)). Those factors point to the conclusion that Oklahoma’s charter schools are government entities. They are created by the State to further its constitutional obligations, and are subject to extensive supervision and control. In *Biden v. Nebraska*, this Court also considered whether the entity can “be dissolved by the State.” 600 U.S. 477, 491 (2022). That is true for Oklahoma’s charter schools, too.

In arguing otherwise, petitioners and the United States ignore Oklahoma law. Contrary to their insistence that charter schools are not state-created, Oklahoma law provides that such schools are “established” when the State enters into a charter with a chartering entity—which cannot itself be a private school. Okla. Stat. tit. 70, §§ 3-132.2(C), 3-134(C). Moreover, while petitioners and the United States emphasize that

charter schools have greater leeway to design their curricula, they ignore that charter schools' curricula must be approved by the State, and that the State dictates certain topics charter schools can and cannot teach. And while charter schools are encouraged to innovate, they—like all public schools—must meet state standards for results.

Oklahoma agrees with the United States that the state-action doctrine is not the correct framework here. But that framework produces the same result. A private actor can “be deemed a state actor when the government has outsourced one of its constitutional obligations” to it or when it performs a “traditional, exclusive public function[].” *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809, 810 n.1 (2019); see *West v. Atkins*, 487 U.S. 42, 54-57 (1988). Oklahoma disagrees that its charter schools are private actors, but either way, they are best understood as entities to which Oklahoma has outsourced its constitutional obligation to provide a system of free, publicly funded schools that are open to all. And that obligation is one of the few traditional and exclusive public functions. Thus, Oklahoma’s charter schools are state actors, just like its traditional public schools.

III. A ruling for petitioners would have profound consequences. It would immediately render the federal CSP and the laws of 45 other States—which all require charter schools to be both public and secular—unconstitutional, eliminating a critical source of funding and creating chaos and confusion for thousands of charter schools and millions of schoolchildren nationwide. It would subject religious institutions to regulation in ways that would either threaten religious liberty or grant religious charter schools a special status compared to secular charter schools. And

it would eliminate the line this Court has carefully drawn and applied in a series of cases between programs that funnel state aid to religious education through the independent, private choices of parents and direct state aid to religious prayer and teaching.

Religious education is an invaluable benefit for millions of Americans who choose it. But our Constitution has never required the creation of religious public schools. There is no basis to change that now.

ARGUMENT

I. STATES MAY REQUIRE SECULAR EDUCATION IN THEIR PUBLIC SCHOOLS

The Court’s precedents recognize, and reconcile, the competing commands of the Religion Clauses when it comes to funding religious education. Petitioners focus on one side of the equation, while simply ignoring the competing considerations.

A. States May Not Exclude Private Religious Parties From Generally Available Public-Benefit Programs

From *Trinity Lutheran* through *Carson*, this Court has made clear that when a State offers a generally available public benefit to private actors, it cannot deny that benefit to religious entities. Oklahoma—which led the *amicus* effort on behalf of States that supported the challengers in *Espinoza*—strongly supports that free exercise principle.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that the Free Exercise Clause barred Missouri from excluding a church from a “public benefit” program that provided playground resurfacing grants “solely because it [was] a church.” 582 U.S. 449, 466-67 (2017). There, “[t]he parties agree[d]

that the Establishment Clause ... d[id] not prevent Missouri from including Trinity Lutheran” in the program. *Id.* at 458. Still, Missouri argued that it could exclude Trinity Lutheran based on the “play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” *Id.* This Court disagreed. *Id.* at 467.

In *Espinoza v. Montana Department of Revenue*, the Court held that Montana could not prevent parents from using scholarships, supported by tax credits, at religious schools. *See* 591 U.S. 464, 486 (2020). As in *Trinity Lutheran*, the parties agreed that “the scholarship program [was] permissible under the Establishment Clause” because “the government support ma[de] its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools.” *Id.* at 473-74. Still, Montana argued that it could exclude religious schools under the “play in the joints” between the Religion Clauses, despite allowing “[v]irtually every [other] private school in Montana” to participate. *Id.* at 471. This Court again disagreed. *Id.* at 486.⁶

⁶ The funding prohibition in *Espinoza* was a so-called “Blaine Amendment,” a no-aid provision born of invidious anti-Catholic hate. *See* 591 U.S. at 498 (Alito, J., concurring). Petitioners have tried to smear the Oklahoma constitution with the same stain. But as the Oklahoma Supreme Court has explained, Oklahoma’s constitution is distinct. Pet.App.10a-14a & nn.7-8 (discussing *Prescott v. Oklahoma Capitol Pres. Comm’n*, 373 P.3d 1032 (Okla. 2015)). In any event, the decision below can be affirmed based on the validity of the requirement in the Oklahoma Charter Schools Act that charter schools must be public and nonsectarian. Pet.App.14a-15a, 29a-30a. The Court need not reach, or rely on, the Oklahoma constitution.

And, in *Carson ex rel. O.C. v. Makin*, the Court held that Maine could not exclude religious private schools from a public benefit designed to provide tuition “at the public school or the approved private school of the parent’s choice.” 596 U.S. 767, 782 (2022). Just as in *Espinoza* and *Trinity Lutheran*, there was no Establishment Clause concern because the funding filtered through the private choices of parents. *Id.* at 781. Still, Maine argued that its exclusion of religious schools was permissible because it (1) was aimed at providing a “rough equivalent” of a public education; and (2) was based on the religious use of funds, not religious status. *Id.* at 782-89.

Carson rejected both of these rationales. It accepted that Maine could permissibly choose to “provide a strictly secular education in its public schools.” *Id.* at 785. But the benefit at issue was not public schooling; it was “tuition” at “the approved *private school* of the parent’s choice.” *Id.* at 782 (emphasis added). And those schools did not resemble public schools at all: They “d[id] not have to accept all students,” were “often *not* free,” and were “exempt from” the vast majority of requirements governing Maine’s public schools. *Id.* at 783. The Court also rejected Maine’s use/status argument. *Id.* at 786-89.

After *Carson*, the line is clear: If a State offers “tuition assistance that parents may direct to the public or private schools of *their* choice,” it cannot exclude private schools because they are religious. *Id.* at 785. But when it comes to public schools, States “may provide a strictly secular education.” *Id.* Amazingly, neither petitioners nor the United States even acknowledge this second principle.

B. Different Considerations Apply To Religious Teaching In Public Schools

Carson's holding that States may require secular education in their public schools reflects decades of precedents recognizing that mixing public schooling and religion raises unique constitutional concerns.

1. The Religion Clauses balance competing concerns. The Free Exercise Clause prohibits discrimination against religion by the State. And the Establishment Clause embodies the Founders' concerns that "the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services" was "one of the greatest dangers to the freedom of the individual to worship in his own way." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). This principle has particular salience for public education—where the Court has repeatedly held that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, Champaign Cnty.*, 333 U.S. 203, 211 (1948). Indeed, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-34 (1987).

The reasons for this concern are many. For example, "public education" "'inculcat[es] [the] fundamental values necessary to the maintenance of a democratic political system,'" including "tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Public

schools are uniquely coercive, in both direct and indirect ways. *See, e.g., Engel*, 370 U.S. at 430-31 (even “voluntary” prayer in public school is “coercive” because it places “the power, prestige, and financial support of government ... behind a particular religious belief”). Children are also “susceptible to ‘religious indoctrination’” in a way that mature adults are not. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Government involvement in religious education is thus, at the least, a “sensitive area.” *Mitchell v. Helms*, 530 U.S. 793, 807 (2000) (plurality opinion).

Take *McCullum*. There, the Court addressed a local policy allowing “religious teachers, employed by private religious groups, ... to come weekly into the [public] school buildings” during regular school hours to teach religion. 333 U.S. at 205. Emphasizing how this policy leveraged the “state’s compulsory education system” to provide “religious instruction,” the Court held 8-1 that this practice was “beyond all question” an Establishment Clause violation. *Id.* at 209-11. While “encourag[ing] religious instruction ... follows the best of our traditions,” “Government may not ... undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.” *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

Nor is *McCullum* an aberration. The Court has repeatedly held that the introduction of religious teaching into public schools raises Establishment Clause concerns. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 40 (1985) (mandatory moment of silence for prayer); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205-06 (1963) (nonmandatory Bible recitation and prayer); *Engel*, 370 U.S. at 424 (nonmandatory prayer recitation). Even the most ardent defenders of

the Free Exercise Clause have observed that the Court’s public-school prayer cases represent “the Court’s finest hour with the Establishment Clause” and are “firmly grounded in the history and rationale of disestablishment.” Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 144-45 (2023).

Of course, religious expression is not forbidden behind the school gates. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). But time and again the Court has affirmed—in decisions that no one has asked this Court to reconsider here—that religious teaching and public schooling do not mix.

2. No one questions that public funds can reach—and be used by—religious private schools. But the Court has never held that the Establishment Clause permits—much less that the Free Exercise Clause requires—direct aid for religious instruction *in public schools*. Indeed—and as petitioners never really dispute—under this Court’s precedents, creating and funding a religious *public* school would violate the Establishment Clause. *See* Brinig & Garnett, *supra*, at 149 (“[I]f the Supreme Court’s Establishment Clause canon establishes anything clearly, it is that public schools cannot teach religion as the truth of the matter.”). At the very least, any play in the joints between the Religion Clauses *permits* States to maintain strictly secular public schools, if they so choose. *See, e.g., Carson*, 596 U.S. at 785.

Petitioners’ and the United States’ claim that St. Isidore, Inc. was excluded from a general government benefit program “solely because it is religious,” *e.g., Isidore.Br.1; see US.Br.1*, thus elides the questions at the core of this case. As the Oklahoma Supreme

Court recognized, this case “turns on” St. Isidore, Inc.’s effort to advance “religious teachings and activities through a new public charter school.” Pet.App.29a-30a. That distinguishes it from *Trinity Lutheran*, *Espinoza*, and *Carson*, and raises profound Establishment Clause problems absent in those cases.

Petitioners’ reliance on the practice of funding *private* religious schools at the founding changes nothing. “There were no public schools as we understand them at the founding.” Chapman & McConnell, *supra*, at 146. “Public schools in anything remotely resembling the current system first came into being in the early 1830s, and compulsory education in the last half of the nineteenth century.” *Id.* And since the advent of the modern public-education system, there is no history of creating—or funding—religious public schools. St. Isidore would be the Nation’s first. If anything, history cuts the other way.⁷

* * *

In the wake of the *Trinity Lutheran-Espinoza-Carson* Trilogy, one question thus stands out: Are Oklahoma’s charter schools public schools? If so, then Oklahoma may require that they provide “a strictly secular education.” *Carson*, 596 U.S. at 785.

⁷ Petitioners’ reliance on the country’s shameful history of “Christianizing and civilizing the Indians,” Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 U. Ark. Little Rock L. Rev. 941, 949 (1999); see Board.Br.5,34,52; St.Isidore.Br.51, if anything, shows the risks that attend the government’s direct involvement in religious instruction.

II. OKLAHOMA'S CHARTER SCHOOLS ARE PUBLIC SCHOOLS

Instead of addressing that obvious question, petitioners have rested their case on whether Oklahoma charter schools qualify as “state actors.” See Board.Br.23-44; St.Isidore.Br.27-47; Resp.App.123a-25a (St. Isidore application). But missing from petitioners’ discursions on the Court’s various state-action formulations and cases is any explanation of why that analysis makes sense here. It doesn’t.

As the United States explains (at 19-20, 29-30), there is no doctrinal connection between the Court’s state-action cases and the questions at the core of this case. Those cases ask whether specific *conduct* by a *private* party is fairly attributable to the State. This case does not challenge any particular action by St. Isidore, Inc. or its employees; it concerns St. Isidore’s very existence as a public charter school. That matters because, even as to charter schools, the type of action challenged can impact the determination whether the school is a state actor or not. Compare, e.g., *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 121-22 (4th Cir. 2022) (dress code), with *Caviness v. Horizontal Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 817 (9th Cir. 2010) (personnel action); States.Br.7-8 & n.2.

Nor is there any practical benefit to using the Court’s state-action precedents. Those precedents are notoriously “difficult terrain” “to traverse” and far from a “model of consistency.” *Lebron*, 513 U.S. at 378. Indeed, the malleability of the state-action doctrine is underscored by the United States’ flip-flop from just two Terms ago in analyzing whether a charter school was a state actor under almost the same set of circumstances. See US.Br.3. There is a better way.

A. Oklahoma’s Public Charter Schools Are Public Schools

Charter schools represent an important innovation in public education, but they remain at their core just what they are created to be—public schools. Congress and all 46 States with charter-school laws provide that charter schools are public schools. No principle of constitutional law, or anything else, requires this Court to override that consensus.

1. It Is Well-Settled That Public Schools Share Key Defining Features

Public schools across the country and in Oklahoma share several key defining features. They are free, open to all, funded by the State, subject to state control, nondiscriminatory, and nonsectarian. Federal and state law, dictionary definitions, and this Court’s precedent all reflect that understanding.

Oklahoma law defines “public school[s]” as “all free schools supported by public taxation,” Okla. Stat. tit. 70, § 1-106, which are open to “all the children of the State” and “free from sectarian control,” Okla. Const. art I, § 5.⁸ Federal law—which the United States largely ignores—likewise defines a “[p]ublic school” as a school that is either “operated by a State” entity or “operated wholly or predominantly from or through the use of governmental funds or property, or

⁸ Other States’ laws adopt similar definitions. *See, e.g.*, Mo. Ann. Stat. § 160.011(7) (“‘Public school’ includes all elementary and high schools operated at public expense”); Nev. Rev. Stat Ann. § 385.007(7) (“‘Public schools’ means all [schools], classes and educational programs which receive their support through public taxation”); Wis. Stat. Ann. § 115.01(1) (“Public schools are the elementary and high schools supported by public taxation.”).

funds or property derived from a governmental source.” 42 U.S.C. § 2000c(c); *see also* 20 U.S.C. § 7801(26)(A) (defining the related term “free public education” as “education that is provided ... at public expense, under public supervision and direction, and without tuition charge,” from grades K-12).

In addition to federal and state law, dictionary definitions of “public school” similarly focus on whether schools are “established under state law,” “regulated by the local state authorities,” “funded and maintained by public taxation,” and “open and free to all children.” *School*, *Black’s Law Dictionary* (7th ed. 1999); *see also Public School*, *American Heritage Dictionary*, <https://tinyurl.com/4x689nzb> (defining “public school” as a school “supported by public funds and providing free education”).

And this Court looked to many of the same factors in assessing whether Maine’s tuition-benefit program offered the benefit of “a free public education” in *Carson*. 596 U.S. at 782. Emphasizing that Maine itself defined the benefit program as “tuition ... at the public school *or the approved private school* of the parent’s choice,” *id.* (emphasis added), the Court concluded that there was no question that many of the schools eligible to participate in Maine’s program were private schools. As it explained, they “d[id] not have to accept all students,” were “often *not* free,” and were “exempt from” the vast majority of the curriculum and testing requirements governing Maine’s public schools. *Id.* at 783. In addition, they could “be single-sex,” and unlike Maine’s public schools, did not need to “hire state-certified teachers.” *Id.* at 784.

All this comports with common understanding as well. In enacting the federal CSP, for example, U.S. legislators described the “hallmarks of our public

schools” as: “[t]hey cannot discriminate on the basis of race, religion, disability or any other factor”; “[t]hey must be open to all students interested in attending”; and “[t]hey must be nonsectarian in their programs, employment practices, and all other operations.” 139 Cong. Rec. 3419, 3500 (1993) (statement of Senator Lieberman). No surprise they also stressed that charter schools “will be public schools.” *Id.* Likewise, years later President George W. Bush—in a statement cited by the United States (at 35)—extolled the ways in which the federal CSP program creates “public schools that provide families with a valuable educational alternative.” Press Release, *National Charter Schools Week, 2007*, White House (Apr. 27, 2007), <https://tinyurl.com/ypeunrbx>.⁹

2. Oklahoma’s Public Charter Schools Share These Defining Features

Here, these defining characteristics point unmistakably to the conclusion that Oklahoma’s charter schools are public schools, just as state law provides.

a. Oklahoma’s charter schools must be “equally free and open to all students as traditional public

⁹ The United States’ reliance on this statement is ironic. President Bush championed charter schools as a means of “strengthening our public schools and improving education for all children in America.” Press Release, *National Charter Schools Week, 2004*, White House (Apr. 30, 2004), <https://tinyurl.com/46zyy3sh>. His administration promoted the federal CSP as part of the No Child Left Behind Act, while emphasizing that charter schools must be “public schools” and “nonsectarian.” *CSP Guidance, supra*, at 6-7, 15. And President Bush—a profoundly religious man and strong supporter of faith-based initiatives—hardly was one to discriminate against religion. Yet the United States today asks this Court, in effect, to declare that the federal CSP—along with state charter-school laws—engage in invidious religious discrimination.

schools and shall not charge tuition or fees.” Okla. Stat. tit. 70, § 3-136(A)(9). They are funded by the State in the same way as traditional public schools—by public taxes, on a per-pupil basis, largely under Oklahoma’s State Aid formula. *Id.* § 3-142(A), (D). And like traditional public schools, they cannot be single-sex or otherwise limit admission on any basis other than geographic residence, *id.* § 3-140(D), and they must be non-sectarian, *id.* § 3-136(A)(2). None of that is true of Oklahoma’s private schools.

Moreover, charter schools, like traditional public schools (and unlike private schools), are subject to significant government control. They are established by the State and may be unilaterally closed by the State. *See id.* §§ 3-132.2(C)(1)(b), 3-137(F). They must comply with the same testing and reporting requirements as traditional public schools. *Id.* § 3-136(A)(4); *see also id.* § 3-136(A)(18). And they must comply with the same “health, safety, civil rights, and insurance,” and disability laws. *Id.* § 3-136(A)(1), (6).

From student communications and discipline to ID cards and clothing, the State also regulates how charter schools interact with their students—just like it regulates traditional public schools. *Supra* 11. And when it comes to charter-school employees, boards, and property, the State again treats charter schools much like other public schools. Charter schools are “school district[s]” for purposes of sovereign immunity; they get “government lease rates” for property rentals; their boards are subject to the same conflict-of-interest, continuing-education, audit, reporting, and transparency rules as other public-school boards; and their teachers participate in the same public-employee retirement and insurance programs as traditional public-school teachers. Okla. Stat. tit. 70, §§ 3-

136(A)(5), (7), (11)-(15), 3-142(F); *see id.* §§ 6-401, 24-100.10(A), 24-160. The list goes on. *Supra* 8-12.

b. Petitioners point to a handful of distinctions between charter schools and traditional public schools. Isidore.Br.46; Board.Br.29-31. But none suffices to take charter schools outside of Oklahoma’s public-school system. To be sure, charter schools have flexibility in designing their curricula. But so do traditional public schools: Oklahoma’s State Board of Education “shall allow as much flexibility at the district level as possible” for the development of curricula and courses. Okla. Stat. tit. 70, § 11-103.6(O)(2); *see id.* §§ 11-103.6(A)(2), 11-103.6a(F); *supra* 9-10 & n.3. In any event, charter schools are subject to the same academic standards and testing requirements as traditional public schools. Okla. Stat. tit. 70, §§ 3-134(B)(12), 3-136(A)(4), (18). And the State must approve the curricula for charter schools and any subsequent material changes thereto. *Id.* §§ 3-134(B)(13), 3-136(A)(3), (D); Resp.App.5a. Oklahoma law also applies the same public-school restrictions on curricula—such as teaching critical race and gender theories—to charter schools. *Supra* 10.

Beyond the curricular point, petitioners raise mere quibbles. St. Isidore, Inc. notes (at 46) that charter schools can hire non-certified teachers. But other public schools can *also* hire non-certified adjunct teachers, Okla. Stat. tit. 70, § 6-122.3(G), and most charter schools—including St. Isidore—commit to hiring only certified teachers anyway. *E.g.*, Resp.App.136a. Meanwhile, the Board stresses (at 29-31) that charter schools are supervised by their own governing boards and have some flexibility over their personnel and governance policies. But as explained, charter-school board members are subject to

many of the same requirements as school district board members, charter-school boards are considered “governmental” under state law, and charter-school governance and personnel matters largely track the requirements for traditional public schools. *Supra* 11-12. And charter schools ultimately remain subject to government supervision and control. *Supra* 8-12.

Reaching further, the Board offers (at 42) an undorned string-cite of laws from which charter schools are exempt as purported evidence that charter schools are not public entities. But many of those citations concern the administrative functioning of local school boards, which could not logically apply to charter schools given their different board structure. *See, e.g.*, Okla. Stat. tit. 70, § 5-122 (local school board clerk must countersign checks). These administrative exemptions say nothing about the core nature of a public school. And as to that core nature—free, open to all, state-funded, state-controlled, nondiscriminatory, and nonsectarian—charter schools are indistinguishable from traditional public schools.

c. It is thus unsurprising that federal law also recognizes charter schools as public schools. Federal law requires that “charter schools” be “public school[s]” to qualify for CSP grants. 20 U.S.C. § 7221i(2)(E); *see id.* § 7221b(b)(1). The Department of Education has found that requirement met in countless instances in disbursing CSP funds, including to Oklahoma charter schools. And the Individuals with Disabilities Education Act—which guarantees a “free appropriate public education” and, thus, is focused on *public-school* students—expressly applies to charter schools. *See* 20 U.S.C. §§ 1400(d)(1)(A), 1413(a)(5), 7221i(2)(G); 34 C.F.R. § 300.209(a).

* * *

In short, Oklahoma charter schools *are* public schools under all of the traditional criteria. No doubt that explains why petitioners and the United States seem intent on avoiding that crucial question.

**B. As Public Schools, Oklahoma’s Public
Charter Schools Are Government Entities**

As public schools, it is unsurprising that Oklahoma’s charter schools are government entities, too.

1. As the United States explains, this Court has focused on “two structural considerations” in deciding whether bodies qualify as government entities: “government ‘creat[ion]’ and government ‘control.’” US.Br.20 (quoting *Lebron*, 513 U.S. at 383, 396-97).

Thus, in *Biden v. Nebraska*, the Court held that the Missouri Higher Education Loan Authority (MOHELA) qualified as a government entity because it was “created by the State to further a public purpose” and was “governed by state officials and state appointees,” “report[ed] to the State,” and could “be dissolved by the State.” 600 U.S. 477, 491 (2023). In *Lebron*, the Court held that Amtrak was a government entity where it was “established and organized under federal law,” a majority of its board members were appointed by the President, and Congress “expressly reserved” the right to repeal its chartering statute “at any time.” 513 U.S. at 397-400. And, in *Arkansas v. Texas*, the Court held that the University of Arkansas was a state instrumentality where it was denominated “an instrument of the state,” its board had to report the University’s expenditures to the legislature, and the State “own[ed] all the property used by the University.” 346 U.S. 368, 370 (1953).

The same conclusion follows here. First, Oklahoma’s charter schools are “created by the State to further a public purpose.” *Biden*, 600 U.S. at 491; *see* Okla. Stat. tit. 70, § 3-131 (purposes); *supra* 8-9. And, second, Oklahoma’s charter schools remain “subject to the State’s supervision and control” and “directly answerable” to it—to the point where the State can shutter charter schools for a host of reasons at any time. *Biden*, 600 U.S. at 490-91; *supra* 11-12; *see supra* 8-11 (reporting and other supervision requirements). Moreover, like the entities in *Biden* and *Arkansas*, Oklahoma explicitly *claims* charter schools as its own: They are “denominated ‘a public [school],’” “referred to as” such, and woven into the fabric of the public-school system. *Arkansas*, 346 U.S. at 370; *see Biden*, 600 U.S. at 491; *cf. Lebron*, 513 U.S. at 392-93 (discussing “disclaimer of agency status”).

This is not a novel conclusion. Lower courts have routinely held that charter schools are government entities. *See Graham v. Board of Educ.*, 8 F.4th 625, 629 (7th Cir. 2021) (Easterbrook, J.); *Nampa Classical Acad. v. Goesling*, 447 F. App’x 776, 777-78 (9th Cir. 2011); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010); *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 602 S.W.3d 521, 529-30 (Tex. 2020); *McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 768 S.E.2d 389, 398-99 (S.C. 2015); Pet.App.17a-19a. One of petitioners’ own *amici* has reached the same conclusion. *See, e.g.,* S.C. Op. Att’y Gen., 2022 WL 20471447, at *3-4 (S.C.A.G. June 30, 2022). And none of these rulings has crippled the charter-school movement, or radically expanded the universe of government entities. *Cf., e.g.,* Board.Br.37-39.

2. Petitioners’ and the United States’ efforts to avoid this significant state creation and control fail.

First, each accuses Oklahoma and the Oklahoma Supreme Court of resting on mere “labels.” See Board.Br.27; Isidore.Br.31; US.Br.25-26. But that could not be further from the truth. Charter schools are public schools because of *substantive* rules of law regarding how they are “established” (by the State), how they must operate (free, open to all, and subject to significant state control and oversight), and who has ultimate control (again, the State). The fact that state law—not to mention federal law—also calls a spade a spade is hardly a deficiency. See *Biden*, 600 U.S. at 490 (noting MOHELA’s designation as a “public instrumentality” in finding the government-entity test satisfied); *Arkansas*, 346 U.S. at 370 (similar).

Second, and speaking of labels, petitioners’ theory of this case rests on the idea that charter schools are simply “private contractors.” See, e.g., Board.Br.28; Isidore.Br.3; US.Br.23-24. But that theory is flatly refuted by Oklahoma law. As discussed, charter schools are “establish[ed]” through the chartering process. Okla. Stat. tit. 70, §§ 3-132.2(C)(1)(b), 3-134(C); Okla. Admin. Code § 210:40-87-5(b). Although St. Isidore, Inc.—the applicant—is private, the charter school that is “established” when the Board grants an application is a distinct entity: a “public school” that can “enter into contracts,” “sue and be sued,” and the like. Okla. Stat. tit. 70, §§ 3-132.2(C)(1)(b), 3-136(E). And the fact that charter schools may be managed on a day-to-day level by private contractors does not eliminate the ultimate control and supervision exercised by the State.

Finally, petitioners note that the State does not select charter schools’ governing boards, as was the case

in *Lebron*. Board.Br.41; Isidore.Br.34. But Oklahoma does consider charter school boards “[g]overnmental’ ... boards.” *E.g.*, Okla. Judicial Ethics Op. 2023-3, 538 P.3d 572, 572 (Okla. Jud. Eth. Adv. Pan. Oct. 16, 2023). And in any event, the Court has never described governmental board appointments as a *necessary* condition of a government entity. It is simply one way—not the only way—that a State can control an entity. And given that Oklahoma itself establishes charter schools, “set[s] the terms of [their] existence,” oversees their operation, and “can abolish [them] and set the terms of [their] dissolution,” *Biden*, 600 U.S. at 491 (first alteration in original), the Oklahoma Supreme Court was correct to conclude that charter schools, as public schools, *are* government entities under this Court’s precedents.

C. To The Extent Relevant, Oklahoma’s Public Charter Schools Are State Actors

As the United States recognized just two Terms ago as to a school with materially indistinguishable characteristics, charter schools are also “state actors” insofar as they help a State fulfill its obligation to provide a free, publicly funded education open to all comers. *See* US.Br.8-14, *Peltier v. Charter Day Sch., Inc.*, 143 S. Ct. 2657 (2023) (No. 22-238) (*Peltier*.Br.).

1. This Court has found state action present under many different considerations. Here, two mutually enforcing state-action tests confirm Oklahoma’s charter schools are state actors: (1) Oklahoma has delegated one of its constitutional obligations to charter schools; and (2) that obligation is a traditional and exclusive state function. Either is sufficient.

First, a private actor can “be deemed a state actor when the government has outsourced one of its constitutional obligations” to that private actor. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 810 n.1 (2019); see *West v. Atkins*, 487 U.S. 42, 54-57 (1988). Otherwise, a State would “be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights.” *West*, 487 U.S. at 56 n.14. Here, Oklahoma’s constitution obligates the State to establish a system of free, publicly funded schools open to all. Pet.App.6a; see Okla. Const. art. XIII, § 1; *id.* art. I, § 5. That readily satisfies the state-action test set forth by *West* and confirmed by *Halleck*.¹⁰

And, second, the obligation Oklahoma has delegated—the provision of a free, public education open to all—is also one of the few traditional and exclusive state functions. As the Oklahoma Supreme Court has repeatedly recognized, creating and operating the State’s public-school system are “governmental functions in their entirety.” *Consolidated Sch. Dist. No. 1 of Tulsa Cnty. v. Wright*, 261 P. 953, 955 (Okla. 1927); see *Wilson v. Gipson*, 753 P.2d 1349, 1355 (Okla. 1988) (maintenance of public schools was a “purely governmental function”). A private actor that fulfills that quintessential government function is a state actor.

2. Petitioners’ attempts to (a) distinguish *West* and (b) argue that this case does not concern a traditional and exclusive public function fail.

¹⁰ *West* involved an obligation imposed by the U.S. Constitution, but the Court has indicated that state constitutional obligations qualify, too. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55-56 (1999).

As for *West*, petitioners first claim that the State had “fully” outsourced its duty to provide medical care for prisoners. Isidore.Br.44-45; Board.Br.35. But this Court never suggested that Dr. Atkins, the contract orthopedist who was sued, could have violated West’s Eighth Amendment rights with impunity so long as the State *also* employed a full-time physician—which the hospital in *West* *did*, 487 U.S. at 44.

Petitioners next observe that the inmate in *West* had no choice but to seek care from the state-contracted orthopedist. Isidore.Br.45; Board.Br.36. True enough. *West*, 487 U.S. at 44. But, as the United States noted in *Peltier* (and does not disclaim here), West’s inability to seek treatment elsewhere was the *source* of the State’s constitutional obligation to provide medical care in the first place. *Id.* at 54; *see Peltier*.Br.12. The Court did not suggest that lack of choice was otherwise a prerequisite to finding state action. *Peltier*.Br.12. And it is not.

Petitioners’ attempts to refute the Oklahoma Supreme Court’s conclusion (Pet.App.20a-24a) that providing a free, public education open to all is a traditional and exclusive public function fare no better. Petitioners accuse the Oklahoma Supreme Court of “gerrymander[ing]” its analysis by focusing on “public[]” education, rather than education more generally. Board.Br.32; *see* Isidore.Br.43. But the provision of a free, public education open to all is critical to the obligation guaranteed by the State. *Supra* 37. The fact that other forms of education are available does not change that important duty.

Moreover, this Court took a similar tack in *Rendell-Baker v. Kohn*, where it asked whether “the education of maladjusted high school students”—not “education” more generally—was an exclusive public

function. 457 U.S. 830, 842 (1982); *see Halleck*, 587 U.S. at 810-11 (asking whether the “operation of public access channels on a cable system,” not “the operation of a public forum for speech” “more generally,” was an exclusive state function); *Peltier*.Br.13 (explaining that “*Rendell-Baker* confirms that the court of appeals correctly rejected petitioners’ ‘high level of generality’ in framing the relevant function as ‘providing “educational services” generally’”).

And there can be no doubt that the provision of free, public education open to all is a traditional and exclusive public function in Oklahoma, as the Oklahoma Supreme Court found. Pet.App.21a; *see Rendell-Baker*, 457 U.S. at 842 (engaging in State-specific analysis); *Peltier*.Br.11, 16-17 (same). Petitioners’ attempt to refute this conclusion through broad-brush references to “[o]ur nation’s history” fails. Board.Br.32. Public schools did not exist at the founding, and States are the only entities that have ever provided a free, public education open to all.

3. Citing *Rendell-Baker*, petitioners and the United States suggest that privately operated schools can never be state actors. Board.Br.25-26; Isidore.Br.28-30; US.Br.29-35. But *Rendell-Baker* just illustrates that the state-action analysis is *conduct-specific*. The Court concluded only that the school at issue was not a state actor *for purposes of its termination decisions* because those decisions “were not compelled or even influenced by any state regulation.” 457 U.S. at 841-42. “Indeed,” the Court explained, “in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school’s personnel matters.” *Id.* at 841.

This case is very different. For one thing, St. Isidore *cannot exist* without the State first “establish[ing]” it. Okla. Stat. tit. 70, § 3-132.2(C)(1)(b); *id.* § 3-134(C); *see id.* § 3-137(F) (Board may shutter St. Isidore). Its curriculum, and changes thereto, require state approval before implementation. *Id.* §§ 3-134(B)(13), 3-136(A)(3), (D); Resp.App.5a. And far from showing “little interest” in the conduct at issue, the State has expressly forbidden exactly what St. Isidore, Inc. and the Board would like to do: create and fund a sectarian public charter school under the auspices of Oklahoma’s public-education system. Okla. Stat. tit. 70, § 3-136(A)(2). That is nothing like the situation *Rendell-Baker* confronted.

4. Finally, the Board posits (at 38) that finding state action here “would convert a vast array of regulated entities and government contractors into state actors.” Not so. Petitioners and their *amici* focus on entities that look little like charter schools—run-of-the-mill government contractors and funding recipients that are neither created by the State, delegated a traditional and exclusive state duty, nor knitted directly into the fabric of an existing public system like charter schools. Holding that Oklahoma’s charter schools are state actors for purposes of the Religion Clauses in deciding this case would not dictate an answer for any other entities, under other States’ laws, engaging in distinct conduct. Nor would it mean holding that Oklahoma’s charter schools are state actors for *all* purposes or any specific actions.

* * *

In the end, petitioners’ position seems to be that if the Court squints hard, ignores the laws passed by Congress and 46 States, and invokes the notoriously

malleable state-actor test, it can find that charter schools are merely private contractors in the name of advancing the *Trinity Lutheran-Espinoza-Carson* Trilogy. The Court should reject that approach.

III. A RULING THAT STATES ARE REQUIRED TO CREATE AND FUND RELIGIOUS CHARTER SCHOOLS WOULD HAVE PROFOUND CONSEQUENCES

All this explains why the Constitution does not require Oklahoma to create and fund the Nation’s first religious public school. A contrary ruling by this Court would have profound consequences.

A. Start with the federal CSP. Since 1994, that program has provided billions of dollars of critical aid to public charter schools. *See Charter Schools 101*, Nat’l All. Public Schs., <https://tinyurl.com/38fet6at>. Yet, word for word, federal law governing the CSP imposes exactly the same nonsectarian limitation on charter schools as Oklahoma law does. To receive federal CSP grants, a State’s “charter school[s]” not only must be “public school[s] ... operated under public supervision and direction,” but also must be “nonsectarian in [their] programs, admissions policies, employment practices, and all other operations.” 20 U.S.C. § 7221i(2)(B), (E). A ruling for petitioners thus would bring grants under the federal CSP to a grinding halt, since charter schools could no longer meet these eligibility requirements.¹¹

¹¹ The United States ignores the federal CSP, except to note (at 4) that the Office of Legal Counsel found *one* aspect of the program unconstitutional—the restriction on an applicant’s religious “affiliati[on].” *See Exclusion of Religiously Affiliated Schools from Charter-School Grant Program*, 44 Op. O.L.C. 131, 137 (2020). But the same OLC opinion makes clear that OLC

In some States, a ruling for petitioners could pose an existential threat to *all* charter schools. Many state constitutions require a “single, statewide public school system,” and prohibit the use of public-school funds outside that system. *E.g.*, *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 753 (Ct. App. 1999). Charter-school opponents have often tried to wield these provisions against charter schools, citing their “operational independence.” *Id.* at 754. But state courts have—until now—uniformly rejected such claims precisely because charter schools *are*, in name and substance, “part of [the public-school] system.” *E.g.*, *id.* at 753-55.¹² A ruling for petitioners here, on the ground that charter schools are not truly public schools or government entities, would destabilize this consensus and create grave uncertainty about the future of charter schools in these States. The ensuing chaos would harm the millions of American schoolchildren, especially from minority and low-

did not question that an applicant must “assur[e] the nonsectarian character of the charter-school-program itself.” *Id.* at 134; *see id.* at 134-35 (observing that “[i]t is one thing for the program to require the curriculum of a charter school to be nonsectarian,” but another “to forbid a religious institution from setting up or operating a charter school that otherwise meets federal requirements”); *see supra* 24. No doubt that is because of the Establishment Clause concerns presented by public religious programs, such as the one that St. Isidore would establish.

¹² *See also, e.g. Boulder Valley Sch. Dist. RE-2 v. Colorado State Bd. of Educ.*, 217 P.3d 918, 928 (Colo. Ct. App. 2009); *Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 211-12 (Mich. 1997); *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148, 1156-57 (Ohio 2006); *Utah Sch. Bds. Ass’n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1128-31 (Utah 2001).

income families, who depend on charter schools for better educational opportunities. *Supra* 7.

For the charter schools that remain, families could confront a different problem. In some communities, charter schools are the *only* public-school option. For example, virtually every public school in the City of New Orleans is a charter school. *See* Hawkins, *supra*. In Oklahoma itself, charter schools are the default option for some families. *See supra* 12-13. And in other rural communities, charter schools often “fill gaps in existing educational offerings,” creating, for example, a public high school where none previously existed. Fiona Sheridan-McIver & Christy Wolfe, *Charter Schools in Rural Areas* 6, Nat’l All. Pub. Charter Schs. (2023), <https://tinyurl.com/3n7kukea>. If petitioners prevail, some students’ only free, public-school option—and only realistic way to comply with the State’s compulsory-education law—therefore could become a religious school.

Even if that school is—as petitioners claim to be the case here, *see* Board.Br.15—nominally open to all, students who do not share the school’s religious faith will face an impossible choice: They can either participate in the school’s teachings and worship activities against their own conscience or decline to participate and face being disciplined for violating the school’s rules or, perhaps worse from a teenager’s perspective, risk being “labeled as [an] odd ball” by their peers. Chapman & McConnell, *supra*, at 145. That is exactly the concern that this Court’s school-prayer precedents protect against.

B. A ruling for petitioners also would invite a host of new disputes, as religious schools, families, and courts confront the many questions that would arise from the creation of religious charter schools.

As discussed, a central feature of charter schools is that they are subject to the same nondiscrimination requirements as all public schools. St. Isidore, Inc. states (at 13) that its school is open to all. But the student handbook adds a caveat: “Admission assumes the student and family willingness to adhere with respect to the beliefs, expectations, policies, and procedures of the school as presented in the handbook.” Pet.App.213a-14a (No. 24-396). That includes the belief “that Christ is present in the Holy Eucharist,” “required” attendance at mass, and a commitment to “[s]upport the [religious] mission of the School.” *Handbook, supra*, at 27, 42, 45. Students may be disciplined, including with suspension, for failing to comply with the handbook. *Id.* at 43. So would St. Isidore really be open to all?

Even if St. Isidore, Inc. is willing to represent that the St. Isidore school will take all-comers, the next case will be a religious charter school that tests this limit. Indeed, religious entities have previously challenged such “all-comers” requirements as corroding their “identity, cohesion, and message.” *E.g.*, Pet.Br.12, 19-20, *Christian Legal Soc’y Ch. of the Univ. of Cal., Hastings Coll. of L. v. Martinez (CLS)*, 561 U.S. 661 (2010) (No. 08-1371); *see CLS*, 561 U.S. at 731 (Alito, J., dissenting) (explaining how “accept-all-comers policy would violate the First Amendment rights of private groups”). But this is just one of the issues courts would soon confront.

If petitioners prevail, another natural question will be whether charter-school teachers who—like St. Isidore’s—are classified as “ministers,” Pet.App.221a (No. 24-396), are protected by the ministerial exception. Can teachers who are paid with state tax dollars, included in the State’s retirement and health-

insurance systems, and treated like government employees *also* be deemed ministers of a faith for purposes of the First Amendment? Either answer will upset the careful balance this Court's caselaw has struck, resulting in either the erosion of the ministerial exception for religious schools or the erosion of the nondiscrimination protections in public schools.

And those are just some of the questions that a ruling for petitioners will raise: What happens when a religious charter school disciplines a student for failing to participate in (or objecting to) required worship activities or creeds? Do students have First Amendment rights to express their own different faiths at such schools? It would be interesting to know petitioners' answers to these questions. But the real question is what comes next, after this case.

Petitioners try to get around these concerns by suggesting that no one will be forced to attend a religious charter school, *see* Isidore.Br.13, but that will not prevent these issues from arising. As noted, in some areas a charter school is the only or default public-school option. *Supra* 12-13. And even if a student can opt out by transferring to another public school, or (with sufficient means) attend a private school, that does not distinguish that student from one at a traditional public school (who likewise is not compelled to attend *that* school) or eliminate the potential stigma for a student or family who opts out of the local religious charter school. Moreover, the religious charter school may offer the best free educational option, creating a different kind of pressure.

Oklahoma in no way denigrates or questions the rights of religious institutions like St. Isidore, Inc. under the First Amendment to practice their faith free from the same antidiscrimination rules that apply to

secular institutions. *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746-62 (2020). Those rights are important. But respecting those rights—as to whom schools must admit, whom they may hire or fire as teachers, or otherwise—effectively would grant religious charter schools a special status compared to other charter schools. This distinguishes this case from *Trinity Lutheran*, *Espinoza*, and *Carson*, where the challengers sought only participation in the program on the same terms as everyone else.

The bottom line is this: Either religious charter schools are bound by the same requirements as other charter schools—which inevitably will inhibit religious liberty; or religious charter schools will enjoy a special status compared to other charter schools.

C. A ruling for petitioners also would revolutionize this Court’s religious-funding jurisprudence. As Chief Justice Rehnquist stressed in *Zelman v. Simmons-Harris*, the Court has “drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” 536 U.S. 639, 649 (2002) (collecting cases); *see Carson*, 596 U.S. at 779-80; *Espinoza*, 591 U.S. at 473-74; *Mitchell*, 530 U.S. at 810-11 (plurality opinion). “True private choice” has been the defining feature of this Court’s religious-funding precedents.

The challengers in recent Free Exercise cases have repeatedly underscored the compatibility of their position with that principle. *See, e.g., Carson*.Pet.Br.40 (stressing that “Maine’s program aids students, not the schools they choose to attend,” and turns on “numerous independent decisions of private individuals”

(quoting *Zelman*, 536 U.S. at 655)); *Espinoza*.Pet.Br.48 (emphasizing necessary element of “true private choice” (quoting *Zelman*, 536 U.S. at 653)); *Espinoza*.Reply.Br.1 (similar). And Justices have pressed these challengers on exactly this point at argument, confirming they were “not defending the notion of [a] direct subsidy.” *Carson*.Tr.44-47 (Barrett, J., questioning); *see id.* at 15-16 (counsel conceding lack of viable Free Exercise claim for “direct institutional aid”); *Espinoza*.Tr.69-70 (similar).

But having arrived at this point, petitioners now claim that none of this really mattered. If petitioners prevail, this firewall will be vitiated and state funds will pour into religious public charter schools just as they do traditional public schools. As petitioners concede, charter-school funding mirrors traditional public-school funding in most respects. *E.g.*, Board.Br.17; *see* Okla. Stat. tit. 70, § 3-142(A). Just as funds never pass through the hands of parents who choose to send their children to traditional public schools, the money here would flow directly to schools like St. Isidore—with no parental “br[eak]” in the “circuit,” *Zelman*, 536 U.S. at 652, resulting in a fundamental doctrinal overhaul of this Court’s precedents.

Petitioners claim that this case is just like *Zelman* and the rest because the amount of State Aid received by St. Isidore would be based on enrollment. *See* Board.Br.53; St.Isidore.Br.49. But not all funding available to charter schools depends on student enrollment. *See, e.g.*, Okla. Stat. tit. 70, § 26-104(A) (healthcare benefit funding “based on the number of school district employees”). And while the State Aid formula does factor in student attendance, there is no simple one-to-one relationship between a given student and any fixed sum of money. The formula is tied

to *average* attendance over a months-long period, not any specific student or family choice. *See id.* § 18-201.1(B). And aid is adjusted by a variety of other factors—such as students’ special needs, the size and location of the school, teacher qualifications, and so on. *Id.*; *id.* § 18-200.1(D); *Sources of Revenue State Aid Formula Penalties/Adjustments* 15-27, Okla. Sch. Fin. Servs. Div. (2024), <https://tinyurl.com/5n7knejm>. And while charter schools with zero students would get no funds, *see* Board.Br.53, that proves nothing. The same is true of all public schools.

But more fundamentally, petitioners’ view that per-pupil funding equates to purely private choice proves too much. Between the availability of private schooling, home schooling, public charter schooling, transfers between traditional public schools, magnet programs, and the like, one could just as easily characterize enrollment at *any* particular public school as a “choice” in some respect. *See, e.g.*, Okla. Stat. tit. 70, § 8-101.2(A) (transfers). If that’s right, then *every* public school’s per-pupil funding results from “private choice,” just like in *Zelman* and its progeny. Taking petitioners’ view seriously, that is, States could—and indeed, their theory goes, *must*—establish religious public schools under the guise that per-pupil funding necessarily carries independent choice along with it. That can’t be right. But it is just one example of how embracing petitioners’ theory would have radical effects for both the country and this Court.

A snapshot in time shows the sea change petitioners actually seek. In *Zelman*, the Court split 5-4—over strenuous dissents—on whether Ohio *could* make vouchers available to parents who wished to send their children to private religious schools, as well as private secular schools. That was a “true private

choice” program. 536 U.S. at 649. In his decision for the Court, Chief Justice Rehnquist observed that Ohio also offered parents the option of charter schools funded by state law—called “[c]ommunity schools”—that “can have no religious affiliation.” *Id.* at 647. Not a single Justice suggested that this restriction on Ohio’s charter schools was in any sense problematic. Flash forward and petitioners are saying that *Zelman*’s “true private choice” principle not only allows religious charter schools but *requires* them.

* * *

Sometimes you can push a good thing too far. The *Trinity Lutheran-Espinoza-Carson* Trilogy protects free exercise rights by ensuring that religious institutions are not barred from generally available benefits programs. Oklahoma strongly supports that principle. But that principle has limits and, as this Court recognized in *Carson*, it does not require the creation of religious public schools. The Court should reject petitioners’ invitation to extend the *Trinity Lutheran* Trilogy to hold that States that offer charter schools must create and fund religious charter schools. Adopting that position would upend the charter-school system to the detriment of children and families whose hopes are tied to such schools and radically change the relationship between Church and State. At the very least, States remain free under the Constitution to opt against going down that path.

CONCLUSION

The judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

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ADDENDUM

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20 U.S.C. § 1413

§ 1413. Local educational agency eligibility

(a) In general

A local educational agency is eligible for assistance under this subchapter for a fiscal year if such agency submits a plan that provides assurances to the State educational agency that the local educational agency meets each of the following conditions:

* * *

(5) Treatment of charter schools and their students

In carrying out this subchapter with respect to charter schools that are public schools of the local educational agency, the local educational agency—

(A) serves children with disabilities attending those charter schools in the same manner as the local educational agency serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the local educational agency has a policy or practice of providing such services on the site to its other public schools; and

(B) provides funds under this subchapter to those charter schools—

(i) on the same basis as the local educational agency provides funds to the local educational agency's other public schools, including proportional distribution based on relative enrollment of children with disabilities; and

2a

(ii) at the same time as the agency distributes other Federal funds to the agency's other public schools, consistent with the State's charter school law.

* * *

20 U.S.C. § 7221a

§ 7721a. Program authorized

(a) In general

The Secretary may carry out a charter school program that supports charter schools that serve early childhood, elementary school, or secondary school students by—

(1) supporting the startup of new charter schools, the replication of high-quality charter schools, and the expansion of high-quality charter schools;

(2) assisting charter schools in accessing credit to acquire and renovate facilities for school use; and

(3) carrying out national activities to support—

(A) the activities described in paragraph (1);

(B) the dissemination of best practices of charter schools for all schools;

(C) the evaluation of the impact of the charter school program under this part on schools participating in such program; and

(D) stronger charter school authorizing practices.

* * *

20 U.S.C. § 7221i

§ 7221i. Program authorized

In this part:

* * *

(2) Charter school

The term “charter school” means a public school that—

(A) in accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this paragraph;

(B) is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;

(C) operates in pursuit of a specific set of educational objectives determined by the school’s developer and agreed to by the authorized public chartering agency;

(D) provides a program of elementary or secondary education, or both;

(E) is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;

(F) does not charge tuition;

(G) complies with the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the

Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), section 1232g of this title (commonly referred to as the “Family Educational Rights and Privacy Act of 1974”), and part B of the Individuals with Disabilities Education Act [20 U.S.C. 1411 et seq.];

(H) is a school to which parents choose to send their children, and that—

(i) admits students on the basis of a lottery, consistent with section 7221b(c)(3)(A) of this title, if more students apply for admission than can be accommodated; or

(ii) in the case of a school that has an affiliated charter school (such as a school that is part of the same network of schools), automatically enrolls students who are enrolled in the immediate prior grade level of the affiliated charter school and, for any additional student openings or student openings created through regular attrition in student enrollment in the affiliated charter school and the enrolling school, admits students on the basis of a lottery as described in clause (i);

(I) agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such State audit requirements are waived by the State;

6a

(J) meets all applicable Federal, State, and local health and safety requirements;

(K) operates in accordance with State law;

(L) has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school; and

(M) may serve students in early childhood education programs or postsecondary students.

* * *

7a

42 U.S.C. § 2000c

§ 2000c. Program authorized

As used in this subchapter—

* * *

(c) “Public school” means any elementary or secondary educational institution, and “public college” means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

* * *

34 C.F.R. § 300.209(a)

§ 300.209. Treatment of charter schools and their students.

(a) *Rights of children with disabilities.* Children with disabilities who attend public charter schools and their parents retain all rights under this part.

* * *

9a

Okla. Const. art. I

ARTICLE I – Federal Relations

SECTION I-5. Public schools - Separate schools.

Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools.

* * *

Okla. Const. art. XIII

ARTICLE XIII – Education

SECTION XIII-1. Establishment and maintenance of public schools.

Establishment and maintenance of public schools. The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.

* * *

Okla. Stat. tit. 70, § 1-106

§ 1-106. Public schools—Definition—What included.

The public schools of Oklahoma shall consist of all free schools supported by public taxation

* * *

Okla. Stat. tit. 70, § 3-132.2

**§ 3-132.2. Powers and responsibilities of
Board—Accreditation and compliance—
Conversion schools—Supplemental online
courses.**

* * *

C. 1. For purposes of the Oklahoma Charter Schools Act, “charter school” means:

* * *

b. on July 1, 2024, and after, a public school established by contract with a school district board of education, a higher education institution, an institution of higher learning accredited pursuant to Section 4103 of Title 70 of the Oklahoma Statutes, a federally recognized Indian tribe, or the Statewide Charter School Board,

to provide learning that will improve student achievement and as defined in the Elementary and Secondary Education Act of 1965, as reauthorized by P.L. No. 114-95, also known as the Every Student Succeeds Act.

* * *

Okla. Stat. tit. 70, § 3-134

§ 3-134. Applications—Presubmission training—Contents.

* * *

C. A board of education of a public school district, public body, public or private college or university, private person, or private organization may contract with a sponsor to establish a charter school. A private school shall not be eligible to contract for a charter school under the provisions of the Oklahoma Charter Schools Act.

* * *

Okla. Stat. tit. 70, § 3-136**§ 3-136. Written charter contract requirements—Employment contracts.**

A. Beginning July 1, 2024, a written contract entered into between the Statewide Charter School Board and the governing board of a charter school or statewide virtual charter school or a written contract entered into between a sponsor and the governing board of a charter school shall ensure compliance with the following:

1. Except as provided for in the Oklahoma Charter Schools Act, a charter school and virtual charter school shall be exempt from all statutes and rules relating to schools, boards of education, and school districts; provided, however, a charter school or virtual charter school shall comply with all federal regulations and state and local rules and statutes relating to health, safety, civil rights, and insurance. By January 1, 2000, the State Department of Education shall prepare a list of relevant rules and statutes which a charter school and virtual charter school must comply with as required by this paragraph and shall annually provide an update to the list;

2. A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a non-public sectarian school or religious institution;

3. The charter contract shall provide a description of the educational program to be offered. A charter school or virtual charter school may provide a comprehensive program of instruction for a prekindergarten

program, a kindergarten program, or any grade between grades one and twelve. Instruction may be provided to all persons between four (4) and twenty-one (21) years of age. A charter school or virtual charter school may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas such as mathematics, science, fine arts, performance arts, or foreign language. The charter of a charter school or virtual charter school which offers grades nine through twelve shall specifically address whether the charter school or virtual charter school will comply with the graduation requirements established in Section 11-103.6 of this title. No charter school shall be chartered for the purpose of offering a curriculum for deaf or blind students that is the same or similar to the curriculum being provided by or for educating deaf or blind students that are being served by the Oklahoma School for the Blind or the Oklahoma School for the Deaf;

4. A charter school or virtual charter school shall participate in the testing as required by the Oklahoma School Testing Program Act and the reporting of test results as is required of a school district. A charter school or virtual charter school shall also provide any necessary data to the Office of Accountability within the State Department of Education;

5. A charter school or virtual charter school shall be subject to the same reporting requirements, financial audits, audit procedures, and audit requirements as a school district. The State Department of Education or State Auditor and Inspector may conduct financial, program, or compliance audits. The Statewide Charter School Board may request that the

State Auditor and Inspector conduct a financial, program, or compliance audit for any charter school or virtual charter school it oversees. A charter school or virtual charter school shall use the Oklahoma Cost Accounting System to report financial transactions to the State Department of Education. The charter school or virtual charter school shall be subject to the limitations on spending, including provisions of the Oklahoma Constitution, for any funds received from the state, either through the State Department of Education or other sources;

6. A charter school or virtual charter school shall comply with all federal and state laws relating to the education of children with disabilities in the same manner as a school district;

7. A charter school or virtual charter school shall provide for a governing board for the school which shall be responsible for the policies and operational decisions of the charter school or virtual charter school. All of the charter school or virtual charter school governing board members shall be residents of this state and shall meet no fewer than ten (10) months of the year in a public meeting within the boundaries of the school district in which the charter school is located or within this state if the governing board oversees multiple charter schools in this state or oversees a virtual charter school. The governing board of a charter school or virtual charter school shall be subject to the same conflict of interest requirements as a member of a school district board of education including but not limited to Sections 5-113 and 5-124 of this title. Members appointed to the governing board of a charter school or virtual charter school shall be subject to the same instruction and

continuing education requirements as a member of a school district board of education and pursuant to Section 5-110 of this title shall complete twelve (12) hours of instruction within fifteen (15) months of appointment to the governing board and pursuant to Section 5-110.1 of this title shall attend continuing education;

8. A charter school or virtual charter school shall not be used as a method of generating revenue for students who are being home schooled and are not being educated at an organized charter school site or by a virtual charter school;

9. A charter school or virtual charter school shall be as equally free and open to all students as traditional public schools and shall not charge tuition or fees;

10. A charter school or virtual charter school shall provide instruction each year for at least the number of days or hours required in Section 1-109 of this title;

11. A charter school or virtual charter school shall comply with the student suspension requirements provided for in Section 24-101.3 of this title;

12. A charter school or virtual charter school shall be considered a school district for purposes of tort liability under The Governmental Tort Claims Act;

13. Employees of a charter school or virtual charter school may participate as members of the Teachers' Retirement System of Oklahoma in accordance with applicable statutes and rules if otherwise allowed pursuant to law;

14. A charter school or virtual charter school may participate in all health and related insurance pro-

grams available to employees of a public school district;

15. A charter school or virtual charter school and their respective governing boards shall comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act;

16. The governing board of a charter school or virtual charter school shall notify the sponsor within ten (10) business days in the instance of any significant adverse actions, material findings of noncompliance, or pending actions, claims, or proceedings in this state relating to the charter school, the virtual charter school, or an educational management organization with which the charter school or virtual charter school has a contract;

17. No later than September 1 each year, the governing board of each charter school or virtual charter school formed pursuant to the Oklahoma Charter Schools Act shall prepare a statement of actual income and expenditures for the charter school or virtual charter school for the fiscal year that ended on the preceding June 30, in a manner compliant with Section 5-135 of this title. The statement of expenditures shall include functional categories as defined in rules adopted by the State Board of Education to implement the Oklahoma Cost Accounting System pursuant to Section 5-145 of this title. Charter schools and virtual charter schools shall not be permitted to submit estimates of expenditures or prorated amounts to fulfill the requirements of this paragraph; and

18. A charter school or virtual charter school contract shall include performance provisions based on a

performance framework that clearly sets forth the academic and operational performance indicators that shall be used by charter school and virtual charter school sponsors to evaluate their respective schools. The sponsor may develop a separate performance framework to evaluate a charter school or virtual charter school that has been designated by the State Department of Education as implementing an alternative education program throughout the school. The sponsor shall require a charter school or virtual charter school to submit the data required in this subsection in the identical format that is required by the State Department of Education of all public schools in order to avoid duplicative administrative efforts or allow a charter school or virtual charter school to provide permission to the Department to share all required data with the Board. The performance framework shall serve as the minimum requirement for charter school and virtual charter school performance evaluation and shall include, but not be limited to, the following indicators:

- a. student academic proficiency,
- b. student academic growth,
- c. achievement gaps in both proficiency and growth between major student subgroups,
- d. student attendance,
- e. recurrent enrollment from year to year as determined by the methodology used for public schools in Oklahoma,
- f. in the case of high schools, graduation rates as determined by the methodology used for public schools in Oklahoma,

- g. in the case of high schools, postsecondary readiness,
- h. financial performance and sustainability and compliance with state and Internal Revenue Service financial reporting requirements,
- i. audit findings or deficiencies,
- j. accreditation and timely reporting,
- k. governing board performance and stewardship including compliance with all applicable laws, regulations, and terms of the charter contract, and
- l. mobility of student population for the virtual charter school framework.

The sponsor including the Statewide Charter School Board shall annually evaluate its charter schools or virtual charter schools according to the performance framework. The results of the evaluation shall be presented to the governing board of the charter school or virtual charter school and the governing board of the charter school sponsor in an open meeting.

B. An applicant or the governing board of an applicant may hold one or more charter contracts. Each charter school or virtual charter school that is part of a charter contract shall be separate and distinct from any other charter school or virtual charter school. For the purposes of this subsection, “separate and distinct” shall mean that a charter school or virtual charter school governing board with oversight of more than one charter school or virtual charter school shall not combine accounting, budgeting, recordkeeping, admissions, employment, or policies and operational

decisions of the charter schools or virtual charter schools it oversees.

C. The charter contract of a charter school or virtual charter school shall include a description of the personnel policies, personnel qualifications, and method of school governance. A charter school or virtual charter school shall not enter into an employment contract with any teacher or other personnel until a contract has been executed with its sponsor. The employment contract shall set forth the personnel policies of the charter school or virtual charter school including, but not limited to, policies related to certification, professional development, evaluation, suspension, dismissal and nonreemployment, sick leave, personal business leave, emergency leave, and family and medical leave. The contract shall also specifically set forth the salary, hours, fringe benefits, and work conditions. The contract may provide for employer-employee bargaining, but the charter school or virtual charter school shall not be required to comply with the provisions of Sections 509.1 through 509.10 of this title.

Upon contracting with any teacher or other personnel, the governing board of a charter school or virtual charter school shall, in writing, disclose employment rights of the employees in the event the charter school or virtual charter school closes or the charter contract is not renewed.

No charter school or virtual charter school may begin serving students without a contract executed in accordance with the provisions of the Oklahoma Charter Schools Act and approved in an open meeting of the governing board of the sponsor or the Statewide Charter School Board. The governing board of the

sponsor or the Statewide Charter School Board may establish reasonable preopening requirements or conditions to monitor the start-up progress of newly approved charter schools or virtual charter schools and ensure that each brick-and-mortar school is prepared to open smoothly on the date agreed and to ensure that each school meets all building, health, safety, insurance, and other legal requirements for the opening of a school.

D. The charter of a charter school or virtual charter school may be amended at the request of the governing board of the charter school or virtual charter school and upon the approval of the sponsor.

E. A charter school or virtual charter school may enter into contracts and sue and be sued.

F. The governing board of a charter school or virtual charter school shall not levy taxes or issue bonds. A school district that proposes a bond shall include any charter school established pursuant to subsection A of Section 3-132 of this title and located within the school district in planning conversations regarding the bond.

G. The charter of a charter school or virtual charter school shall include a provision specifying the method or methods to be employed for disposing of real and personal property acquired by the charter school or virtual charter school upon expiration or termination of the charter or failure of the charter school or virtual charter school to continue operations. Except as otherwise provided, any real or personal property purchased with state or local funds shall be retained by the sponsor. If a charter school that was previously

sponsored by the board of education of a school district continues operation within the school district under a new charter sponsored by an entity authorized pursuant to Section 3-132 of this title, the charter school may retain any personal property purchased with state or local funds for use in the operation of the charter school until termination of the new charter or failure of the charter school to continue operations.

Okla. Stat. tit. 70, § 3-137

§ 3-137. Duration of contract—Performance report—Renewal—Termination—School closure.

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F. A sponsor may terminate a contract during the term of the contract for failure to meet the requirements for student performance contained in the contract and performance framework, failure to meet the standards of fiscal management, violations of the law, or other good cause. . . .

* * *

H. 1. Beginning in the 2016-2017 school year, the State Board of Education shall identify charter schools and virtual charter schools in the state that are ranked in the bottom five percent (5%) of all public schools as determined pursuant to Section 1210.545 of this title.

2. At the time of its charter renewal, based on an average of the current year and the two (2) prior operating years, a sponsor may close a charter school site or virtual charter school identified as being among the bottom five percent (5%) of public schools in the state. The average of the current year and two (2) prior operating years shall be calculated by using the percentage ranking for each year divided by three, as determined by this subsection.

* * *

Okla. Stat. tit. 70, § 6-122.3

§ 6-122.3. Alternative placement teaching certificate—Alternative placement programs—Adjunct teachers.

* * *

G. The State Board of Education shall promulgate rules authorizing adjunct teachers who shall be persons with distinguished qualifications in their field. Adjunct teachers shall not be required to meet standard certification. A person employed as an adjunct teacher pursuant to this subsection who does not hold a valid certificate to teach shall not be considered a teacher as defined by Section 1-116 of this title.

* * *

Okla. Stat. tit. 70, § 8-101.2**§ 8-101.2. Transfer of student from residential school district.**

A. Except as provided in subsection B of this section, on and after January 1, 2022, the transfer of a student from the district in which the student resides to another school district furnishing instruction in the grade the student is entitled to pursue shall be granted at any time in the year unless the number of transfers exceeds the capacity of a grade level for each school site within a school district. If the capacity of a grade level for each school site within a school district is insufficient to enroll all eligible students, the school district shall select transfer students in the order in which the district received the student transfer applications. The capacity of a school district shall be determined by the school district board of education based on its policy adopted pursuant to subsection B of this section. . . .

* * *

Okla. Stat. tit. 70, § 10-105**§ 10-105. Neglect or refusal to compel child to attend school—Exceptions—Enforcement.**

A. It shall be unlawful for a parent, guardian, or other person having custody of a child who is over the age of five (5) years, and under the age of eighteen (18) years, to neglect or refuse to cause or compel the child to attend and comply with the rules of some public, private, or other school, unless other means of education are provided for the full term the schools of the district are in session or the child is excused as provided in this section. One-half (1/2) day of kindergarten shall be required of all children five (5) years of age or older unless the child is excused from kindergarten attendance as provided in this section. . . .

* * *

D. Any parent, guardian, custodian, child, or other person violating any of the provisions of this section, upon conviction, shall be guilty of a misdemeanor, and shall be punished as follows:

1. For the first offense, a fine not less than Twenty-five Dollars (\$25.00) nor more than Fifty Dollars (\$50.00), or imprisonment for not more than five (5) days, or both such fine and imprisonment;

2. For the second offense, a fine not less than Fifty Dollars (\$50.00) nor more than One Hundred Dollars (\$100.00), or imprisonment for not more than ten (10) days, or both such fine and imprisonment; and

3. For the third or subsequent offense, a fine not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Fifty Dollars (\$250.00), or imprisonment for not more than fifteen (15) days, or both

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such fine and imprisonment.

Each day the child remains out of school after an oral and documented or written warning has been given to the parent, guardian, custodian, child, or other person or the child has been ordered to school by the juvenile court shall constitute a separate offense.

* * *

Okla. Stat. tit. 70, § 18-107

§ 18-107. Definitions.

As used in this title:

* * *

2. “Average Daily Membership” (ADM) means the average number of pupils present and absent in a school district during a school year. Average Daily Membership shall be calculated by dividing the sum of the pupil’s total days present and total days absent by the number of days taught.

a. A pupil who has been absent without excuse ten (10) consecutive days shall be taken off the roll beginning the eleventh day and thereafter shall not be considered in a district’s average daily membership calculation until the pupil is placed on the roll in the district. For the purpose of this paragraph, consecutive days means days for which enrollment is recorded.

b. A pupil enrolled in a statewide virtual charter school who is behind pace and has not completed instructional activity as defined by Section 3-145.8 of this title for a fifteen-school-day period, without excuse as authorized by Section 10-105 of this title, shall be taken off the roll beginning the sixteenth day and thereafter shall not be considered in the virtual charter school’s Average Daily Membership calculation until the pupil is placed on the roll in the virtual charter school.

* * *

Okla. Stat. tit. 70, § 18-200.1

§ 18-200.1 State Aid formula—2022-23 and thereafter.

* * *

D. For the 1997-98 school year, and each school year thereafter, Foundation Aid, the Transportation Supplement, and Salary Incentive Aid shall be calculated as follows:

1. Foundation Aid shall be determined by subtracting the amount of the Foundation Program Income from the cost of the Foundation Program and adding to this difference the Transportation Supplement.

a. The Foundation Program shall be a district's higher weighted average daily membership based on the first nine (9) weeks of the current school year or the preceding school year of a school district, as determined by the provisions of subsection A of Section 18-201.1 of this title and paragraphs 1, 2, 3, and 4 of subsection B of Section 18-201.1 of this title, multiplied by the Base Foundation Support Level. However, for the portion of weighted membership derived from nonresident, transferred pupils enrolled in online courses, the Foundation Program shall be a district's weighted average daily membership of the preceding school year or the first nine (9) weeks of the current school year, whichever is greater, as determined by the provisions of subsection A of Section 18-201.1 of this title and paragraphs 1, 2, 3, and 4 of subsection B of Section 18-201.1 of this title, multiplied by the Base Foundation Support Level.

b. The Foundation Program Income shall be the sum of the following:

- (1) The adjusted assessed valuation of the current school year of the school district, minus the previous year protested ad valorem tax revenues held as prescribed in Section 2884 of Title 68 of the Oklahoma Statutes, multiplied by the mills levied pursuant to subsection (c) of Section 9 of Article X of the Oklahoma Constitution, if applicable, as adjusted in subsection (c) of Section 8A of Article X of the Oklahoma Constitution. For purposes of this subsection, the “adjusted assessed valuation of the current school year” shall be the adjusted assessed valuation on which tax revenues are collected during the current school year, and
- (2) Seventy-five percent (75%) of the amount received by the school district from the proceeds of the county levy during the preceding fiscal year, as levied pursuant to subsection (b) of Section 9 of Article X of the Oklahoma Constitution, and
- (3) motor vehicle collections, and
- (4) gross production tax, and
- (5) state apportionment, and
- (6) R.E.A. tax.

The items listed in divisions (3), (4), (5), and (6) of this subparagraph shall consist of the amounts actually collected from such sources during the preceding fiscal year calculated on a per capita basis on the unit provided

for by law for the distribution of each such revenue.

2. The Transportation Supplement shall be equal to the average daily haul times the per capita allowance times the appropriate transportation factor.

a. The average daily haul shall be the number of children in a district who are legally transported and who live one and one-half (1 1/2) miles or more from school.

b. The per capita allowance shall be determined using the following chart:

	PER CAPITA		PER CAPITA
DENSITY FIGURE	ALLOW- ANCE	DENSITY FIGURE	ALLOW- ANCE
.3000-.3083	\$167.00	.9334-.9599	\$99.00
.3084-.3249	\$165.00	.9600-.9866	\$97.00
.3250-.3416	\$163.00	.9867-1.1071	\$95.00
3417-.3583	\$161.00	1.1072- 1.3214	\$92.00
.3584-.3749	\$158.00	1.3215- 1.5357	\$90.00
.3750-.3916	\$156.00	1.5358- 1.7499	\$88.00
.3917-.4083	\$154.00	1.7500- 1.9642	\$86.00
.4084-.4249	\$152.00	1.9643- 2.1785	\$84.00
.4250-.4416	\$150.00	2.1786- 2.3928	\$81.00

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.4417-.4583	\$147.00	2.3929- 2.6249	\$79.00
.4584-.4749	\$145.00	2.6250- 2.8749	\$77.00
.4750-.4916	\$143.00	2.8750- 3.1249	\$75.00
.4917-.5083	\$141.00	3.1250- 3.3749	\$73.00
.5084-.5249	\$139.00	3.3750- 3.6666	\$70.00
.5250-.5416	\$136.00	3.6667- 3.9999	\$68.00
.5417-.5583	\$134.00	4.0000- 4.3333	\$66.00
.5584-.5749	\$132.00	4.3334- 4.6666	\$64.00
.5750-.5916	\$130.00	4.6667- 4.9999	\$62.00
.5917-.6133	\$128.00	5.0000- 5.5000	\$59.00
.6134-.6399	\$125.00	5.5001- 6.0000	\$57.00
.6400-.6666	\$123.00	6.0001- 6.5000	\$55.00
.6667-.6933	\$121.00	6.5001- 7.0000	\$53.00
.6934-.7199	\$119.00	7.0001- 7.3333	\$51.00
.7200-.7466	\$117.00	7.3334- 7.6667	\$48.00

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.7467-.7733	\$114.00	7.6668- 8.0000	\$46.00
.7734-.7999	\$112.00	8.0001- 8.3333	\$44.00
.8000-.8266	\$110.00	8.3334- 8.6667	\$42.00
.8267-.8533	\$108.00	8.6668- 9.0000	\$40.00
.8534-.8799	\$106.00	9.0001- 9.3333	\$37.00
.8800-.9066	\$103.00	9.3334- 9.6667	\$35.00
.9067-.9333	\$101.00	9.6668 or more	\$33.00

c. The formula transportation factor shall be 2.0:

3. Salary Incentive Aid shall be determined as follows:

a. Multiply the Incentive Aid guarantee by the district's higher weighted average daily membership based on the first nine (9) weeks of the current school year or the preceding school year of a school district, as determined by the provisions of subsection A of Section 18-201.1 of this title and paragraphs 1, 2, 3, and 4 of subsection B of Section 18-201.1 of this title.

b. Divide the district's adjusted assessed valuation of the current school year minus the previous year's protested ad valorem tax revenues held as prescribed in Section 2884 of Title 68 of the Oklahoma Statutes, by one thousand (1,000) and subtract the quotient from the product of

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subparagraph a of this paragraph. The remainder shall not be less than zero (0).

c. Multiply the number of mills levied for general fund purposes above the fifteen (15) mills required to support Foundation Aid pursuant to division (1) of subparagraph b of paragraph 1 of this subsection, not including the county four-mill levy, by the remainder of subparagraph b of this paragraph. The product shall be the Salary Incentive Aid of the district.

* * *

Okla. Stat. tit. 70, § 18-201.1**§ 18-201.1. Weighted membership calculation
for Foundation Aid.**

* * *

B. Beginning with the 2022-2023 school year, the weighted calculations provided for in subsection A of this section shall be based on the higher weighted average daily membership of the first nine (9) weeks of the current school year or the preceding school year of a school district, unless otherwise specified. The higher of the two (2) weighted average daily memberships shall be used consistently in all of the calculations; however, the weighted calculation for a statewide virtual charter school experiencing a significant decline in membership shall be based on the first nine (9) weeks of the current school year for the statewide virtual charter school. For purposes of this subsection, “significant decline in membership” means equal to or greater than a fifteen percent (15%) decrease in average daily membership from the preceding school year to the average daily membership of the first nine (9) weeks of the current school year. The average daily membership data used for all calculations in paragraphs 1, 2, 3, and 4 of this subsection shall be the same as used in the calculation of the State Aid Formula. The weighted calculations provided for in subsection A of this section shall be determined as follows:

1. The weighted pupil grade level calculation shall be determined by taking the highest average daily membership and assigning weights to the pupils according to grade attended as follows:

GRADE LEVEL	WEIGHT
a. Half-day early childhood programs	.7
b. Full-day early childhood programs	1.3
c. Half-day kindergarten	1.3
d. Full-day kindergarten	1.5
e. First and second grade	1.351
f. Third grade	1.051
g. Fourth through sixth grade	1.0
h. Seventh through twelfth grade	1.2
i. Out-of-home placement	1.50

Multiply the membership of each subparagraph of this paragraph by the weight assigned to such subparagraph of this paragraph and add the totals together to determine the weighted pupil grade level calculation for a school district. Determination of the pupils eligible for the early childhood program weight shall be pursuant to the provisions of Section 1-114 of this title. The pupils eligible for the out-of-home placement pupil weight shall be students who are not residents of the school district in which they are receiving education pursuant to the provisions of subsection D of Section 1-113 of this title. Such weight may be claimed by the district providing educational services to such student for the days that student is enrolled in that district. If claimed, the out-of-home placement weight shall be in lieu of the pupil grade level and any pupil category weights for that student. Provided, if a student resides in a juvenile detention center that is restricted to less than twelve (12) beds, the out-of-home placement pupil weight for such students shall be calculated as follows: for a center with

six (6) beds - 3.0; for a center with eight (8) beds - 2.3; and for a center with ten (10) beds - 1.80.

2. The weighted pupil category calculation shall be determined by assigning a weight to the pupil category as follows:

CATEGORY	WEIGHT
a. Visual impairment	3.8
b. Specific Learning Disability	.4
c. Deafness or Hearing Impairment	2.9
d. Deaf-Blindness	3.8
e. Intellectual Disability	1.3
f. Emotional Disturbance	2.5
g. Gifted	.34
h. Multiple Disabilities	2.4
i. Orthopedic Impairment	1.2
j. Speech or Language Impairment	.05
k. Bilingual	.25
l. Special Education Summer Program	1.2
m. Economically Disadvantage	.3
n. Optional Extended School Year Program	As determined by the State Board of Education
o. Autism	2.4
p. Traumatic Brain Injury	2.4
q. Other Health Impairment	1.2

Except as otherwise provided, multiply the number of pupils approved in the school year with the highest average daily membership in each category by the weight assigned to such category and add the totals together to determine the weighted pupil category calculation for a school district. For the 1997-98 school year and subsequent school years, the number to be multiplied by the weight assigned to the gifted category in subparagraph g of this paragraph shall be the lesser of (1) the sum of the number of students who scored in the top three percent (3%) on any national standardized test of intellectual ability plus the number of students identified as gifted pursuant to subparagraphs a through d of paragraph 1 of Section 1210.301 of this title, or (2) the sum of the number of students who scored in the top three percent (3%) on any national standardized test of intellectual ability plus eight percent (8%) of the total average daily membership of the school district for the first nine (9) weeks of the school year.

3. The weighted district calculation shall be determined by determining the calculations for each school district for both the small school district formula and the district sparsity—isolation formula, applying whichever is the greater of the calculations of the two formulas and then applying the restrictions pursuant to subparagraph c of this paragraph.

- a. Small school district formula: 750 minus the average daily membership divided by 750 times .2 times total average daily membership.

The small school district formula calculation shall apply only to school districts whose highest average daily membership is less than 750 pupils. School districts which are consolidated or annexed

after July 1, 2003, pursuant to the Oklahoma School Voluntary Consolidation and Annexation Act shall have the weighted district size calculation for the three (3) school years following the fiscal year in which such consolidation occurred calculated to be the sum of the individual consolidated districts computed as if the consolidation had not taken place. Thereafter, any such district which is consolidated pursuant to the Oklahoma School Voluntary Consolidation and Annexation Act shall not qualify for the weighted district calculation unless the district can satisfy the specifications herein. Subject to the provisions of subparagraph c of this paragraph, the resulting number shall be counted as additional students for the purpose of calculating State Aid.

b. District sparsity - isolation formula:

The district sparsity - isolation formula calculation shall apply only to school districts:

- (1) whose total area in square miles is greater than the average number of square miles for all school districts in this state; and
- (2) whose areal density is less than one-fourth (1/4) of the state average areal density. Areal density shall be determined by dividing the school district's average daily membership by the school district's total area in square miles.

The district sparsity—isolation formula calculation shall be calculated as follows:

The school district student cost factor multiplied by the school district area factor. The resulting product shall be multiplied by the school district's average

daily membership. Subject to the provisions of subparagraph c of this paragraph, the resulting number shall be counted as additional students for the purpose of calculating State Aid.

The school district student cost factor shall be calculated as follows:

The school district's average daily membership shall be categorized into the following grade level groups and applied to the appropriate formulas as computed below:

Grade Level Group

Grades K-5	Divide 74 by the sum of the Grade Level ADM plus 23, add .85 to the quotient, then multiply the sum by the Grade Level ADM.
Grades 6-8	Divide 122 by the sum of the Grade Level ADM plus 133, add .85 to the quotient, then multiply the sum by the Grade Level ADM.
Grades 9-12	Divide 292 by the sum of the Grade Level ADM plus 128, add .78 to the quotient, then multiply the sum by the Grade Level ADM.

The sum of the grade level group's average daily membership shall be divided by the school district's average daily membership. The number one (1.0) shall be subtracted from the resulting quotient.

The school district area cost factor shall be calculated as follows:

Subtract the state average district area from the district area, then divide the remainder by the state average district area;

however, the district area cost factor shall not exceed one (1.0).

The State Board of Education shall define geographical barriers whose location in a school district would inhibit the district from consolidation or annexation. The Board shall make available an application process, review applications, and for districts the Board deems necessary allow additional square miles to be used for the purposes of calculations used for the weighted district sparsity - isolation formula. Provided, that the additional square miles allowed for geographical barriers shall not exceed thirty percent (30%) of the district's actual size.

- c. State Aid funds which a district is calculated to receive as a result of the weighted district calculation shall be restricted as follows:

If, after the weighted district calculation is applied, the district's projected per pupil revenue exceeds one hundred fifty percent (150%) of the projected state average per pupil revenue, then the district's State Aid shall be reduced by an amount that will restrict the district's projected per pupil revenue to one hundred fifty percent (150%) of the projected state average per pupil revenue. Provided, in applying the restriction provided in this division, the district's State Aid shall not be reduced by an amount greater than by the

amount of State Aid which was generated by the weighted district calculation.

The July calculation of the projected per pupil revenue shall be determined by dividing the district's preceding year's average daily membership (ADM) as weighted by the pupil grade level, the pupil category, the district and the teacher experience degree index calculations for projected State Aid into the district's projected total revenues including projected funds for the State Aid Formula for the preceding year, net assessed valuation for the preceding calendar year times thirty-nine (39) mills, county revenues excluding the county four-mills revenues for the second preceding year, other state appropriations for the preceding year, and the collections for the preceding year of state apportionment, motor vehicle revenue, gross production tax, and R.E.A. tax.

The December calculation of the projected per pupil revenue shall be determined by dividing the higher of the district's first nine (9) weeks of the current school year or the preceding school year's average daily membership (ADM) as weighted by the pupil grade level, the pupil category, the district and the teacher experience degree index calculations for projected State Aid into the district's projected total revenues including funds for the December calculation of the current year State Aid Formula, net assessed valuation for the current calendar year times thirty-nine (39) mills, county revenues excluding the county four-mills revenue for the preceding year, other state appropriations for the preceding year, and the collections for the

preceding year of state apportionment, motor vehicle revenue, gross production tax, and R.E.A. tax.

The district's projected total revenues for each calculation shall exclude the following collections for the second preceding year: federal revenue, insurance loss payments, reimbursements, recovery of overpayments and refunds, unused reserves, prior expenditures recovered, prior year surpluses, and other local miscellaneous revenues.

4. The weighted teacher experience and degree calculation shall be determined in accordance with the teacher experience and degree index. The State Department of Education shall determine an index for each state teacher by using data supplied in the school district's teacher personnel reports of the preceding year and utilizing the index as follows:

TEACHER EXPERIENCE--DEGREE INDEX

EXPERI- ENCE	BACHE- LOR'S DEGREE	MASTER'S DEGREE	DOC- TOR'S DEGREE
0-2	.7	.9	1.1
3-5	.8	1.0	1.2
6-8	.9	1.1	1.3
9-11	1.0	1.2	1.4
12-15	1.1	1.3	1.5
Over 15	1.2	1.4	1.6

The school district teacher index for each school district shall be determined by subtracting the weighted average state teacher from the weighted average dis-

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trict teacher. Multiply the school district teacher index if greater than zero by .7 and then multiply that product by the sum of the district's weighted pupil grade level calculation provided in paragraph 1 of this subsection and the weighted pupil category calculation provided in subparagraph m of paragraph 2 of this subsection to determine the weighted teacher experience and degree calculation.

Okla. Stat. tit. 70, § 24-157

§ 24-157. Mandatory gender or sexual diversity training or counseling prohibited; Certain race- or sex-based concepts prohibited from courses.

* * *

B. The provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.

1. No teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts:

a. one race or sex is inherently superior to another race or sex,

b. an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,

c. an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,

d. members of one race or sex cannot and should not attempt to treat others without respect to race or sex,

e. an individual's moral character is necessarily determined by his or her race or sex,

f. an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,

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g. any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or

h. meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.

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Okla. Stat. tit. 70, § 28-101**§ 28-101. Definitions—Oklahoma Parental Choice Tax Credit Program.**

* * *

B. There is hereby created the Oklahoma Parental Choice Tax Credit Program to provide an income tax credit to a taxpayer for qualified expenses to support the education of eligible students in this state.

C. For the tax year 2024 and subsequent tax years, and fiscal year 2026 and subsequent fiscal years, there shall be allowed against the tax imposed by Section 2355 of Title 68 of the Oklahoma Statutes a credit for any Oklahoma taxpayer who incurs a qualified expense on behalf of an eligible student, to be administered subject to the following amounts:

1. If the eligible student attends a private school in this state accredited by the State Board of Education or another accrediting association, the annual maximum credit amount for tax year 2024, fiscal year 2026, and each subsequent fiscal year shall be:

a. Seven Thousand Five Hundred Dollars (\$7,500.00) or the amount of tuition and fees for the private school, whichever is less, if the combined adjusted gross income of the parents or legal guardians of the eligible student during the second preceding tax year does not exceed Seventy-five Thousand Dollars (\$75,000.00),

b. Seven Thousand Dollars (\$7,000.00) or the amount of tuition and fees for the private school, whichever is less, if the combined adjusted gross income of the parents or legal guardians of the eligible student during the second preceding tax year is

more than Seventy-five Thousand Dollars (\$75,000.00) but does not exceed One Hundred Fifty Thousand Dollars (\$150,000.00),

c. Six Thousand Five Hundred Dollars (\$6,500.00) or the amount of tuition and fees for the private school, whichever is less, if the combined adjusted gross income of the parents or legal guardians of the eligible student during the second preceding tax year is more than One Hundred Fifty Thousand Dollars (\$150,000.00) but does not exceed Two Hundred Twenty-five Thousand Dollars (\$225,000.00),

d. Six Thousand Dollars (\$6,000.00) or the amount of tuition and fees for the private school, whichever is less, if the combined adjusted gross income of the parents or legal guardians of the eligible student during the second preceding tax year is more than Two Hundred Twenty-five Thousand Dollars (\$225,000.00) but does not exceed Two Hundred Fifty Thousand Dollars (\$250,000.00), or

e. Five Thousand Dollars (\$5,000.00) or the amount of tuition and fees for the private school, whichever is less, if the combined adjusted gross income of the parents or legal guardians of the eligible student during the second preceding tax year is more than Two Hundred Fifty Thousand Dollars (\$250,000.00);

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Okla. Admin. Code § 210:40-87-5

§ 210:40-87-5. Charter school application.

* * *

(b) Establishment of a new charter school. A new charter school will be considered established when a charter school application complies with 70 O.S. § 3-134 and is approved by the governing board of a sponsoring entity set forth in 70 O.S. § 3-132, or by the State Board of Education following a successful appeal under the procedure established pursuant to state law.

* * *